DOCKET

No. 87-3-CFY
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Title: Randy Braswell, Petitioner
v.
United States

Docketed:
June 26, 1987

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Fawer,Michael Seth

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 26 1987	G	Petition for writ of certiorari filed.
3	Jul 30 1987		Order extending time to file response to petition until August 29, 1987.
4	Aug 14 1987		Brief of respondent United States filed.
5	Aug 19 1987		DISTRIBUTED. September 28, 1987
6	Oct 5 1987		Petition GRANTED.
			**********
8	Oct 19 1987		Order extending time to file brief of petitioner on the merits until December 3, 1987.
9	Dec 3 1987		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
10	Dec 3 1987		Joint appendix filed.
11	Dec 3 1987		Brief of petitioner Randy Braswell filed.
12	Dec 18 1987		Record filed.
		*	Certified original record and C. A. proceedings, 3volumes, received.
13	Jan 5 1988		SET FOR ARGUMENT. Tuesday, March 1, 1988. (2nd case). (1 hour).
14	Jan 7 1988	X	Brief of respondent United States filed.
15	Jan 14 1988		CIRCULATED.
16	Mar 1 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 - 3 (1)

No. 86-

Supreme Court, U.S.
FILED
JUN 26 1987
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN RE GRAND JURY PROCEEDINGS (JOHN DOE)

RANDY BRASWELL,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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48 pp

QUESTION PRESENTED FOR REVIEW

Whether the sole shareholder of a one-man corporation has a Fifth Amendment privilege to refuse to produce the records of that corporation when the mere act of producing such records would have testimonial aspects that might incriminate him.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(1) Petitioner, Randy Braswell

(2) Respondent, the United States of America

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, (#86-4922) whose opinion is herein sought to be reviewed, was rendered on March 31, 1987. This opinion is reported at 814 F.2d 190, reh'g den. ___F.2d ___(1987), and is set forth at Appendix D, pp. 6a to 11a. The judgment and reasons given orally by the United States District Court are unreported, and are set forth at Appendix F, pp. 13a to 14a and Appendix H, pp. 17a to 20a, respectively.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit, which affirmed the judgment of the district court, was rendered on March 31, 1987. Petitioner Randy Braswell timely moved for a rehearing *en banc*, which petition was denied on April 30, 1987.

This petition is being filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court. This Honorable Court has jurisdiction over this proceeding pursuant to Title 28, United States Code, Sections 1254(1) and 2101.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On or about August 20, 1986, petitioner Randy Braswell, president and sole stockholder of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., was served with a "Subpoena To Testify Before Grand Jury," which required his appearance before a federal grand jury sitting in the Jackson Division of the Southern District of Mississippi. This subpoena, which is included in this petition at Appendix I, pp. 21a to 22a called for the production of all of the records of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985. Although the subpoena on its face called for the personal appearance of Randy Braswell, it contained the following "Note:"

> In the alternative, you are commanded to deliver the subpoenaed documents to the agent serving this subpoena, in which event you need not appear or bring the subpoenaed documents at the location, date and time specified above.

Pursuant to mutual agreement of counsel for the parties, the return date on the subpoena was continued from September 15, 1986 to October 15, 1986. On October 14, 1986, petitioner Braswell filed a "Motion To Quash Subpoena for Production of Documents," a memorandum in support of that motion, and a "Motion to Stay." In his motion to quash, petitioner asserted a Fifth Amendment privilege not to produce the records called for by the subpoena,

because the mere act of producing the documents sought would have testimonial aspects that could incriminate him.

The matter was allotted to the Honorable William H. Barbour, Jr., United States District Judge, who set a hearing date, and directed the Government to brief the issues raised by Braswell. On October 23, 1986, the Government filed the "Government's Memorandum of Law in Support of Its Opposition to Braswell's Motion to Quash Grand Jury Subpoena." Thereafter, on November 6, 1986, petitioner filed "Randy Braswell's Motion for Leave to Personally Intervene in These Proceedings, and Quash all Portions of the Subpoena Duces Tecum Calling for the Production of Private Writings." A memorandum in support of this motion was also filed, which memorandum included a reply to the Government's opposition.

A hearing on petitioner's motion to quash was held on November 19, 1986, before Judge Barbour, at which the facts recited below were established.

Petitioner Randy Braswell, a resident of Magnolia, Mississippi, first went into "business for himself" in about 1965. From that date until 1980, Braswell, whose business ventures included the sales and purchases of equipment, oil and gas interests, and land and timber, conducted all of his affairs as an unincorporated sole proprietor. All of his personal financial affairs were also conducted through this "sole proprietorship," i.e., there was no distinction drawn between money or property belonging to Randy Braswell, sole proprietor, and Randy Braswell, private individual.

In 1980, Braswell formed Worldwide Machinery, Inc., a Mississippi corporation. In 1981, Braswell formed a second company, Worldwide Purchasing, Inc., which is also a Mississippi corporation. Braswell owns 100% of the stock of Worldwide Purchasing, Inc., which in turn owns 100% of the stock of Worldwide Machinery, Inc.

According to the testimony of Thomas W. Brock, the Mississippi attorney who performed the legal work creating the two corporations, the companies were brought into existence *solely* for the sake of appearances. In Brock's words:

> A. (By Mr. Brock) Well, when Worldwide Machinery was incorporated, subsequently Worldwide Purchasing, Randy had gotten to the point where it had been a hinderance to do business as an individual, as a matter of form, and some of the companies that he was doing business with, just -- it hurt. It hurt you as far as business was concerned to go in and say I'm Randy Braswell from Magnolia, Mississippi. We felt it was advantage to us strictly as a matter of form to incorporate.
>
> Q. (By Mr. Fawer) Pick out the name Worldwide?
>
> A. (By Mr. Brock) Worldwide to make it sound, you know, big and like we are up and coming.

From Brock's perspective, that of an attorney, none of the "traditional" reasons for incorporating motivated Braswell -- there were no tax reasons, no pen-

sion or profit sharing plans, and no attempt to limit Braswell's personal liability for "corporate" debts. In fact, all of Braswell's "personal" assets, including his house, are in the name of the corporation. (The corporation referred to is Worldwide Purchasing., Inc.. Worldwide Machinery, Inc., is not used to conduct business).

This hearing also demonstrated that the formation of these two corporations changed nothing about the way Randy Braswell's financial affairs were conducted. The directors of these corporations (in addition to Randy Braswell) consist of his mother and his wife, neither of whom had or have any authority whatsoever over the affairs of the corporation.

One other matter also remained unchanged after incorporation: the corporations, as Randy Braswell's face to the business community, did not and do not now have any identity apart from Randy Braswell, the individual, as was illustrated by the following evidence produced at the hearing:

(1) Randy Braswell owns, and has always owned 100% of the stock of the active corporation.

(2) The corporation has only one employee other than Randy Braswell, this being the secretary, who is Braswell's sister-in-law.

(3) Braswell's authority over the corporation is "absolute, total, complete."

(4) Braswell has no personal checking account, only the corporate one.

(5) Braswell's personal expenses, and those of his wife, are paid out of the corporate checking account.

(6) Randy Braswell is the only individual who has the authority to act on behalf of the corporation, and is the only person who has ever acted on behalf of the corporation.

(7) Braswell has total control over the records of the business (and the contents of those records).

(8) These records reflect all of Braswell's financial transactions, personal as well as business.

(9) The credit cards used by Braswell and his wife for personal expenditures are in the name of the corporation.

(10) No bank loans to the corporation were ever made by Ray Price, Jr., Braswell's primary banker, without Braswell's personal guarantee.

(11) Other individuals doing business with World-wide Purchasing, Inc., view themselves as actually doing business with Randy Braswell.

(12) Braswell even acquired the nickname "Worldwide," an indication that others viewed him as being synonymous with the corporation.

In short, Braswell conclusively established that he was the perfect paradigm of a one-man corporation conducting business as a sole proprietor, one who continually mixed his personal affairs with the business. As District Judge Barbour aptly put it: "[t]he way I see the question is that under the facts, Mr. Braswell was obviously doing business through the corporate name but was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled as almost could be conceived."

In addressing the privilege asserted by petitioner Randy Braswell, Judge Barbour found that the exact question before him was whether "the holding of *United States v. Doe*, [should] be applied to [Braswell's] records even though they're corporate in form because as a practical matter they are sole proprietorship form, sole proprietorship records, and that they should not be produced under any circumstances."

The district judge then answered the question he had posed as follows:

> Mr. Braswell in his capacity as president of the corporations has moved to suppress the subpoena under the act of production doctrine, claiming the Fifth Amendment privilege against self incrimination. He argues that the Court should consider in the case of a closely held corporation as to whether they are truly organizations or collective entities under *United States v. Doe*, or whether the court should look at closely held corporations and decide under *Bellis v. United States* as to whether they should be considered as not being organizations but in fact being the alter ego or true identity of the person who owns or controls them in the nature of sole proprietorships.

There is a conflict among the circuits in regard to this issue. The Second Circuit in the case of In Re Two Subpoena Duces Tecum. 769 F.2d 52, 1985, has taken the position that a bright-line test is the appropriate test so that the records of no corpo-

ration are entitled to this Fifth Amendment privilege. The Third Circuit has held otherwise. Other circuits have basically followed the reasoning of the Second Circuit, although a number of the cases are less than definitive.

This court, of course, is required to follow the precedent of the Fifth Circuit. The Fifth Circuit has considered this issue, at least indirectly, in two cases. One, *In Re Grand Jury Subpoena (Lincoln)*, 767 F.2d 564, 1985, and in *United States v. Huckaby*, 776 F.2d 564, 1985. Movant argues that *In Re Lincoln* is distinguishable from the case here and certain language in it allows a factual approach as to whether a corporation can be a collective entity held in a representative capacity as opposed to a a sole proprietorship. This Court does not read *In Re Lincoln* in that manner, and reads *In Re Lincoln* to hold directly that a corporation is not entitled under *United States v. Doe* to enjoy the Fifth Amendment privilege. The Fifth Circuit in *United States v. Huckaby* in footnote 7 does appear to reopen this question, if in fact it was directly decided in *In Re Lincoln*.

The Court notes in regard to *Huckaby* that the language addressing this question is contained in a footnote and is dicta. The Court also notes that the panel in *Huckaby* was made up of judges who were not on the panel in the case of *In Re Lincoln*. The Court further notes that this issue was addressed in *In Re Grand Jury Subpoena, 85-W-71-5*, 784

F.2d 857, Eighth Circuit, 1986. In that case the Eighth Circuit followed the reasoning of the Second Circuit and held that a closely held corporation is not entitled to the privilege. The United States Supreme Court granted [a] writ of certiorari in this case. Obviously the issue is an important one as it has been addressed differently in different circuits, and since the United States Supreme Court has granted certiorari.

This Court will not try to set forth in detail an opinion substantiating the decision that it reaches, but merely holds that the reasoning of the Second Circuit appears to be the best approach to this issue, that it appears to this Court that that is the reasoning accepted by the Fifth Circuit in *In Re Lincoln*, and that that is the reasoning which this Court will follow in this case. Accordingly, the Court will deny the motion to suppress the subpoena.

These reasons of the District Court are set forth at Appendix H, at pp. 17a to 20a. The Court's order itself is contained at Appendix G, p. 15a.

Thereafter, on Tuesday, November 18, 1986, petitioner Braswell appeared before the grand jury and declined to produce any of the records called for in the subpoena. Consequently, upon motion of the Government, petitioner was held in contempt of court by Judge Barbour on November 24, 1986, who ordered him committed to the custody of the Attorney General. This order of commitment was stayed pending Braswell's appeal to the United States Court of Appeals for the Fifth Circuit. The stay granted by

the district court is attached hereto at Appendix E, p. 12a.

After the filing of briefs by petitioner and the United States, the court of appeals rendered its opinion on March 31, 1987, which affirmed the judgment of the district court. In its decision, the court concluded that the opinion of this Court in *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed. 678 (1974) abolished all Fifth Amendment privileges an individual might have regarding the records of any collective entity held by an individual, regardless of the size of of the collective entity. The Fifth Circuit further determined that any corporation, even a one-man corporation, is a collective entity, and thus Braswell could not claim a Fifth Amendment act of production privilege. In rendering its decision, the court did note that the circuit courts of appeal were divided on this issue, and that two other later opinions of other panels of the Fifth Circuit itself appeared to raise the question petitioner had presented to the court.

However, the panel found that the Fifth Circuit's earlier decision in *In Re Grand Jury Proceedings (Lincoln)*, 767 F.2d 1130 (5th Cir. 1985) was binding upon it, and that accordingly the district court's judgment should be affirmed. Thereafter, on April 13, 1987, petitioner filed a petition for rehearing *en banc*, which was denied on April 30, 1987. The order denying Braswell's petition for rehearing *en banc* is attached at Appendix C, pp. 4a to 5a.

Because petitioner did not receive notice of the denial of his petition for rehearing until May 21, 1987, after the mandate of the court of appeals had issued, he was compelled to move for a recall of the mandate

of the court of appeals, and a stay of its reissuance pending his application to this Court for a writ of *certiorari*.

The Court of Appeals granted petitioner's motion for a recall of the mandate, but refused to stay its mandate; and ordered it to issue on June 19, 1987. This order of the Court of Appeals is reproduced at Appendix B, p. 3a.

In consequence thereof, petitioner, pursuant to Rule 44 of the Rules of the Supreme Court sought a stay from the Honorable Byron R. White, Associate Justice, which stay was granted by Justice White on June 10, 1987. This application, and Justice White's order, which is reproduced at Appendix A, pp. 1a to 2a were assigned Matter No. A-892 in this Court. This stay of the mandate of the Court of Appeals will expire at the end of the time allowed for the filing of a petition for a writ of *certiorari*, or upon the disposition of such a petition, should one be timely filed.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. The Decision Of The Court Of Appeals For The Fifth Circuit Is In Conflict With The Decisions Of Other Circuit Courts Of Appeal On The Same Matter.

In a chain of cases whose two most significant links are *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, and *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), this Court has consistently recognized that the mere act of producing documents may have testimonial aspects, and that when those testimonial aspects might be incriminating, a Fifth Amendment privilege may exist. What this Court has never determined is whether an individual has the

right to invoke a Fifth Amendment privilege when the mere act of production would be incriminating, if those documents belong to a one-man corporation, such as petitioner's.

Although this Court's decisions in *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, (1974), *Fisher, supra*, and *Doe, supra*, would appear to have resolved the question, and permit the invocation of the Fifth Amendment privilege against self-incrimination *whenever* the state seeks to compel testimony or testimonial acts which might be incriminating, these decisions have in fact engendered much confusion at the circuit court of appeals level, and consequently, at the district court level. One result of this confusion has been a "split" in the circuit courts of appeal, as explained below.

In petitioner's proceeding, and in *In Re Grand Jury Proceedings (Lincoln)*, 767 F.2d 1130 (5th Cir. 1985), the Fifth Circuit held that the custodian of the records of a collective entity, or corporation, regardless of its size, has no Fifth Amendment privilege regarding the compelled production of those records. The Fifth Circuit held this to be true even if this act of production would personally incriminate the custodian. *In Re Grand Jury Proceedings (John Doe)*, 814 F.2d 190, 192 (5th Cir. 1987).

In making the existence *vel non* of a Fifth Amendment act of production privilege a function of the *nature* of the entity whose records are held, the Fifth Circuit adopted what is now the position of a majority of the circuit courts of appeal. As the Fifth Circuit itself noted in its opinion in petitioner's case, the First, Sixth, Eighth, Ninth, and Tenth Circuits also refuse to grant an act of production privilege to the

custodian of the records of a collective entity. *See*: *In Re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir.) *cert. granted sub. nom.; See v. United States*, ___ U.S. ___, 107 S.Ct. 59, 93 L.Ed.2d 19 (1986); *In Re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 106 S.Ct. 594, 88 L.Ed.2d 574 (1985); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In Re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.), *cert. denied*, 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37 (1984); *see also In Re Grand Jury Proceedings United States*, 626 F.2d 1051, 1053 (1st Cir. 1980). These courts in effect use *Bellis*, and its "collective entity" doctrine, to determine the availability of the privilege when documents are sought by compulsory process.

Finding the rationale underlying the majority's position to be inadequate, the Second, Third, and Fourth Circuits utilize a different approach, one which focuses upon the question of whether the individual holding the records would be personally incriminated by producing and authenticating them. *See*: *United States v. Antonio Sancetta, M.D., P.C.*, 788 F.2d 67, 74 (2d Cir. 1986); *United States v. Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986); *In Re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (*en banc*).

These Courts have found that because the Fifth Amendment protects *any* individual against *any* compelled and incriminating testimony, the privilege is not defeated merely because the documents belong to a collective entity.

This conflict among the circuits, which has been noted by all the circuit courts, the Solicitor General

of the United States,[1] various commentators,[2] represents a compelling reason for granting *certiorari* in this proceeding.

2. The Court of Appeals For The Fifth Circuit Decided An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court.

It belabors the obvious to say that the issues which this proceeding presents arise with some frequency - every circuit court of appeals has written at least one opinion dealing with the Fifth Amendment as it applies to the act of producing records within the last three years.[3] And it is reasonable to expect that in the absence of clear guidelines from this Court, these courts, and the district courts, will be required to cope with the issues raised by the assertion of the privilege again and again, as every conceivable factual variation presents itself.

And although this need alone would justify the granting of the writ, it is more important for this

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[1] *See*, Memorandum for the United States in Opposition, *Morgenstern v. United States*, Case No. 85-658, p. 3. "... the decisions of the Courts of Appeals exhibit considerable disagreement regarding the governing legal rules in this area ...."

[2] *See*: Comment, "Organizational Papers and the Privilege Against Self-Incrimination," 99 Harv.L.Rev. 640 (1986); and Heidt, "The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line," 49 Mo.L.Rev. 439 (1984).

[3] Numerous state courts have also been confronted with identical proceedings in which the availability of the Fifth Amendment privilege was the key issue. See, *e.g.*, (*In Re Grand Jury Subpoena Duces Tecum*, 12/14/84 (*Y v. Kuriansky*), N.Y. Ct. App, 69 N.Y.2d 232 (1987), *certiorari* sought in the United States Supreme Court, *sub. nom.*, *Y and X v. Kurianski*, petition filed April 20, 1987, (#86-1693) 41 CR.L. 4056 (5-20-87).

Court to decide if there is to be any Fifth Amendment privilege at all concerning corporate or collective entity documents. Previous decisions of this Court have made manifest that there is no Fifth Amendment privilege for a corporation itself, *Hale v. Henkel*, 201 U.S. 43 (1906); or for the *contents* of the records of a corporation *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911). What remains to be determined is the reach of those decisions, and the scope of the protection of the Fifth Amendment, when an individual has been called upon to produce the records of a one-man corporation, or even a large collective entity.

It would appear that this Court recognizes this is a question which should be settled by it. Issues identical to those here presented were raised in *In Re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857 (8th Cir.), a case in which that petitioner's writ of *certiorari* was granted, *sub. nom. See v. United States*, ___ U.S.___ , 107 S.Ct. 59 (1986). However, this Court was denied the opportunity to reach the merits of that matter, because on January 15, 1987 the appeal was dismissed upon joint motion of the parties made pursuant to Rule 53 of the Rules of the Supreme Court (Supreme Court Docket No. 85-1987). It is submitted that if it was appropriate to grant *certiorari* in that proceeding, it is equally appropriate to do so here.

3. The Decision Of The Court Of Appeals Is In Conflict With Applicable Decisions Of This Court.

Although the Court of Appeals cites *Bellis* for the proposition that "[A]n individual enjoys no fifth amendment privilege from producing the records of a collective entity," it is not at all certain that *Bellis* stands for this principle. As at least one court of

appeals has noted, an "act of production privilege" was not at issue in *Bellis*, which instead dealt exclusively with the question of a privilege regarding the *contents* of the records of a collective entity. See, *In Re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 n.2 (3rd Cir. 1985) (*en banc*). The Court of Appeals also used *Bellis* to draw a "bright line," one which would bar the custodian of the records of *any* corporation, even a one-man corporation like petitioner's, from claiming a Fifth Amendment privilege regarding the act of producing those records. Again, it is not at all clear that *Bellis* supports this position.

As even a cursory reading of *Bellis* discloses, this Court utilized a number of factors to determine whether an organization was a collective entity, including:

(1) Whether one can presuppose "the existence of an organization which is recognized as an independent entity apart from its individual members" *Bellis, supra*, at 93;

(2) Whether the group is "relatively well organized and structured, and not merely a loose, informal association of individuals" *id.*;

(3) Whether the entity maintains "a distinct set of organizational records, and recognize[s] rights in its members of control and access to them" *id.*; and

(4) Whether the records subpoenaed are in fact "organizational records held in a representative capacity. In other words, it must be fair to say that the records demanded are the records of the organization rather than those of the individual . . ." *id.*

While the Court of Appeals found that this Court "noted in *Bellis* that corporations, no matter how small are collective entities," this does not appear to be a fair reading of *Bellis*. For in the same passage cited by the Court of Appeals, this Court discussed the trend in favor of incorporation, and concluded: "Whether corporation or partnership, many of these [small professional] firms will be independent entities whose financial records are held by a member of the firm in a representative capacity. *In those circumstances the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise.*" *Bellis, supra*, at 101 [emphasis provided]

In addition, the Court of Appeals creates out of whole cloth a waiver of an individual's Fifth Amendment privilege concerning the incriminating aspects of an act of production, a waiver which occurs when any custodian of records accepts "his corporate office." *In Re Grand Jury Proceedings (John Doe), supra*, p. 192. To justify this principle, the Court of Appeals referred to this Court's decision in *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944). However, as was the case with its reading of *Bellis*, the Court of Appeals has taken a decision of this Court which dealt only with the *contents* of records, and extended it to a situation in which only the act of production was at issue.

This encroachment upon and narrowing of an individual's right not to incriminate himself through *any* compelled testimony or testimonial acts appears to directly contravene the holding of this Court in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) wherein this Court looked to the

"act of producing evidence in response to a subpoena," *Fisher, supra*, 410, not to the nature of the entity whose records were sought.

Given such an inconsistency with the opinions of this Court, *certiorari* should be granted.

CONCLUSION

WHEREFORE, this Court is respectfully urged to enter an order granting petitioner Randy Braswell's petition for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supreme Court of the United States

No. A-892

RANDY BRASWELL,

Applicant,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the order of the United States Court of Appeals for the Fifth Circuit, issued June 5, 1987, case No. 86-4922, is continued pending the timely filing of a petition for a writ of certiorari in the above-entitled case. In the event the petition for a writ of certiorari is so timely filed, this order is to remain in effect pending this Court's action on the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order shall continue in effect pending the sending down of the judgment of this Court.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 10th
day of June, 1987.

A true copy JOSEPH F. SPANIOL, JR.
Test:

Clerk of the Supreme Court of the United States
By_____
Deputy

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-4922

IN RE: GRAND JURY PROCEEDINGS:
JOHN DOE

Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

FILED
JUN 6 1987
Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges.
BY THE COURT:

The motion of appellant for recall of the mandate is GRANTED; provided, however, that the mandate shall issue on June 19, 1987. The application for further stay of the mandate pending application for writ of certiorari is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4922

IN RE: GRAND JURY PROCEEDINGS,
JOHN DOE,

Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC
(Opinion March 31, 5 Cir., 1987, ___F.2d ___)
(April 30, 1987)

FILED
APR 30 1987

Before RUBIN RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Pat S. Higginbotham
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4922
Summary Calendar

IN RE GRAND JURY
PROCEEDINGS: JOHN DOE,

Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

(March 31, 1987)
Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges. PER CURIAM:

Randy Braswell, president and sole shareholder of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., appeals his contempt citation for refusing to produce the books and records of these corporations pursuant to a federal grand jury subpoena. Braswell contends that his personal privilege against self-incrimination justifies his refusal to produce the corporate documents because his closely-held corporations are not collective entities within the meaning of *Bellis v. United States*, 417 U.S. 85 (1974). In the alternative, he argues that some of the corporate documents are "private writings" and that, at the very least, the fifth amendment protects these writings. The district court stayed Braswell's commitment

pending this expedited appeal. *See* 28 U.S.C. § 1826(b). We affirm.

I

From 1965 to 1980, Braswell conducted his business, which includes the sale and purchase of equipment, oil and gas interests, and land and timber, as a sole proprietorship. Indeed, Braswell conducted all of his affairs, both personal and business, through the proprietorship.

In 1980, Braswell incorporated Worldwide Machinery, Inc., a Mississippi corporation, and retained ownership of 100% of its stock. Braswell then began conducting his business through Worldwide Machinery. In 1981, Braswell, concerned that the name "Worldwide Machinery" did not reflect his other pursuits, incorporated Worldwide Purchasing, Inc., also a Mississippi corporation. Braswell funded Worldwide Purchasing with the stock he held in Worldwide Machinery, and retained ownership of 100% of the stock of Worldwide Purchasing. Both corporations are active corporations, maintaining a current status with the State of Mississippi, keeping current corporate books and records, including financial records and minutes, and filing corporate tax returns.

In compliance with Mississippi law that corporations have at least three directors, *see* Miss. Code Ann. § 79-3-69, Braswell, his wife, and his mother sit as directors of both corporations. According to Braswell, however, neither his wife nor his mother has any authority over the business affairs of the corporations, although they have assumed the offices of Secretary-Treasurer and Vice-President, respectively.

II

A federal grand jury subpoenaed the books and records of Worldwide Purchasing and Worldwide Machinery on

August 20, 1986.[1] The subpoenas did not request Braswell to testify. Indeed, he was not even required to appear before the grand jury if the subpoenaed documents were delivered to the agent serving the subpoena. After a hearing the district court denied Braswell's motion to quash the subpoena and ordered Braswell to produce the documents, noting:

> [T]he way I see the question is that under the facts, Mr. Braswell was obviously doing business through the corporate name but was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled as almost as could be conceived.

When Braswell appeared before the grand jury, he refused to produce the subpoenaed documents. Upon motion of the government, the district court found Braswell in contempt of court and ordered him committed to the custody of the United States Marshal until he complied with the court's order. The district court, however, stayed the commitment of Braswell pending this expedited appeal.

In ruling upon Braswell's motion to quash the subpoena, the district court considered only the asserted "act of production" privilege.[2] The district court did not rule on the

[1] The subpoena requested "all books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985, to include, but not limited to the following: (1) receipts and disbursements journals; (2) general ledger and subsidiaries; (3) accounts receivable/accounts payable ledgers, cards, and all customer data; (4) bank records of savings and checking accounts, including statements, checks, and deposit tickets; (5) contracts, invoices—sales and purchase, conveyances, and correspondence; (6) minutes and stock books and ledgers; (7) loan disclosure statements and agreements; (8) liability ledgers; (9) retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941."

[2] Braswell's counsel agreed that the issue was not before the court at that time. Accordingly, we do not face the question of whether there is any privilege under the Fifth Amendment for private papers.

assertion that the subpoenaed documents included otherwise privileged "private papers." Braswell argues that the district court erred when it refused to apply the doctrine of *United States v. Doe,* 104 S.Ct. 1237 (1984), which upheld the assertion of an act of production privilege by a sole proprietor, to the case of a closely-held corporation.

Braswell contends that the corporate structure of Worldwide Machinery and Worldwide Purchasing exists only for its appearance[3] and that their formation did nothing to change the manner in which he conducts his business. Despite the presence of the three-member boards of directors, he contends that he has maintained "absolute, total, complete" control over the corporations. Moreover, his personal expenses, and those of his wife, are paid out of the corporate checking accounts. Indeed, the credit cards used by Braswell and his wife for personal expenditures are in the names of the corporations.[4] as are all of Braswell's personal assets, including his house. Finally Braswell stresses the corporations have never acquired a loan from Braswell's primary banker without Braswell's personal guarantee.

III

An individual enjoys no fifth amendment privilege from producing records of a collective entity. *Bellis v. United States,* 417 U.S. 85, 88 (1974); *Grant v. United States,* 227 U.S. 74, 80 (1912). In *Bellis,* the Court defined a collective entity as "an organization which is recognized as an independent entity apart from its individual members." 417 U.S. at 92. The Court reaffirmed this definition of "col-

[3] Braswell claims that the business was not incorporated for tax purposes, for limitation of shareholder liability, or for the creation of pension or profit sharing plans.

[4] Although Braswell asserts that only he has authority to act on behalf of the corporation, his wife apparently has the authority to write checks on the corporate account and to use the corporation's credit.

lective entity" in *Doe*, 104 S.Ct. at 1240 n.4. The law of Mississippi is clear that a corporation is a creature of law, with a legal identity separate and distinct from that of its owners. *United States v. State Tax Comm.*, 505 F.2d 633, 637 (5th Cir. 1974). And the Supreme Court noted in *Bellis* that corporations, no matter how small, are collective entities. 417 U.S. at 100. Accordingly, Braswell's contention that his "one-man" corporations are not collective entities must fail.

Thus, "no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Bellis*, 417 U.S. at 100. Organizational records, subject to the visitorial powers of the state and review by the organization's members, must be produced by the custodian, who, by accepting his corporate office, is deemed to have waived his privilege with respect to any testimonial incrimination inherent in the act of production. *See United states v. White*, 322 U.S. 694, 700 (1944). This circuit has previously held in *In re Grand Jury Proceedings (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985), that *Doe* did not reject the holding of *Bellis*, thereby denying a "collective entity" custodian's assertion of an act of production privilege. Consequently, Braswell, as custodian of corporate documents, has not act of production privilege under the fifth amendment regarding corporate documents.

We note that two later panel opinions of this circuit appear to raise the question whether *Doe* should apply to closely-held corporations. *See United States v. Huckaby*, 776 F.2d 564, 570 n.7 (5th Cir. 1985); *United States v. Coppola*, 788 F.2d 303, 309 (5th Cir. 1986). However, each case raises the issue in *dicta* only, and neither suggests that *Lincoln* is not the law of this circuit.

We also note that the other circuits have split over this issue. The Second, Third, and Fourth Circuits have read *Bellis* narrowly to settle only the question whether a custodian has a fifth amendment privilege in the contents of

"collective entity" documents. These circuits thus allow the custodian of collective entity documents an act of production privilege. *See United States v. Antonio Sancetta, M.D., P.C.*, 788 F.2d 67, 74 (2d Cir. 1986); *United States v. Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc). The First, Sixth, Eighth, Ninth and Tenth Circuits, on the other hand, have refused to grant an act of production privilege to the custodian of collective entity records. *See In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir.), *cert. granted sub. nom.; See v. United States*, 107 S.Ct. 59 (1986); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 771 F.2d 143, 148 (6th Cir.) (en banc), *cert. denied*, 106 S.Ct. 594 (1985); *United States v. Malis*, 737 F.2d 1511, 1512 (9th cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.), *cert. denied*, 105 S.Ct. 90 (1984); *see also In re Grand Jury Proceedings United States*, 626 F.2d 1051, 1053 (1st cir. 1980). We held in *Lincoln* that assertion of an act of production privilege by a corporate custodian is foreclosed by *Bellis*, and that opinion binds this panel.

IV

Braswell also argues that the contents of the books and records are protectible to the extent the books and records are "private writings." This issue was not presented to the district court. Thus, whether or not this asserted privilege exists is not properly before us.

V

The judgment of the district court is AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
GRAND JURY SUBPOENA — MISC NO. 86-198
RANDY BRASWELL — FILED UNDER SEAL
(WORLD WIDE MACHINERY SALES, INC.)
(WORLD WIDE PURCHASING, INC.)

FILED
NOV 24 1986

STAY OF COMMITMENT

That portion of the Judgment and Commitment Order of this Court dated November 24, 1986, relating to the commitment of Randy Braswell is hereby stayed pending his appeal to the United States Fifth Circuit Court of Appeals; *provided*, however, that Mr. Braswell through his attorney submits forthwith to this Court *in camera* an inventory of the books, records, etc., listed on the Grand Jury Subpoena served upon Braswell on September 4, 1986, which books, records, etc., Mr. Braswell will be required to turn over to the Grand Jury in the event the judgment of this Court is affirmed on appeal.

SO ORDERED this 24th day of November, 1986.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY
Clarence A. Pierce, CLERK
By:/s/ L. McCormack
Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
GRAND JURY SUBPOENA — MISC NO. 86-198
RANDY BRASWELL — FILED UNDER SEAL
(WORLD WIDE MACHINERY SALES, INC.)
(WORLD WIDE PURCHASING, INC.)
FILED
NOV 24 1986

JUDGMENT AND COMMITMENT

On Motion of the United States Attorney for the Southern District of Mississippi, for an Order by the Court to enforce its Order of November 12, 1986, heretofore entered in the above entitled matter, the witness Randy Braswell, appearing before the Court in person and with counsel, and said witness having admitted that he had refused and would continue to refuse to furnish the records, documents and papers, described more particularly in this Court's Order, before and to the Grand Jury, the Court having heard argument of counsel and certified transcript of Mr. Braswell's testimony before the Grand Jury on November 18, 1986:

IT IS ADJUDGED that Randy Braswell is in direct and continuing contempt of this Court for his failure to obey the Order of this Court, dated November 12, 1986, heretofore entered herein.

IT IS, THEREFORE, ORDERED that Randy Brawell be and hereby is committed to the custody of the United States Marshal for the Southern District of Mississippi until such time as he shall obey said Order.

SO ORDERED this 24th day of November, 1986.

/s/ William H. Barbour, Jr.

UNITED STATES DISTRICT JUDGE

A TRUE COPY I HEREBY CERTIFY
Clarence A. Pierce, CLERK
By:/s/ L. McCormack
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: MISC. NO.: 86-198
GRAND JURY SUBPOENA:
RANDY BRASWELL
(WORLDWIDE MACHINERY SALES, INC.)
(WORLDWIDE PURCHASING, INC.)
FILED
NOV 12 1986

ORDER

This cause came before the Court on the motion of Randy Braswell as President of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., to quash a Federal Grand Jury Subpoena served upon him to produce all books and records of both corporations for the years 1982 through 1985. The Court, having considered the motion, together with memoranda of law submitted in support of the motion, as well as in opposition thereto, and having heard testimony in regard to the motion on November 12, 1986, and the Court otherwise being fully advised in the premises and for the reasons stated in the elaborate findings of fact and conclusions of law dictated by the Court into the record this date, the Court orders as follows:

1. That the motion to quash be denied and the same is hereby denied, and

2. That the movant appear before the Federal Grand Jury on Wednesday, November 19, 1986, at 2:00 P.M., and produce the records listed in the aforementioned Grand Jury Subpoena.

SO ORDERED this 12th day of November, 1986.

/s/ William H. Barbour, Jr.

UNITED STATES DISTRICT JUDGE
A TRUE COPY, I HEREBY CERTIFY
Clarence A. Pierce, CLERK
By:/s/ L. McCormack
Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
GRAND JURY SUBPOENA:
RANDY BRASWELL
(WORLDWIDE MACHINERY SALES, INC.)
(WORLDWIDE PURCHASING, INC.)

MISC. NO.: 86-198

BEFORE: The Honorable William H. Barbour, Jr.,
United States District Judge

DATE: November 12, 1986

PLACE: Jackson, Mississippi

APPEARANCES:

For Randy Braswell:

Michael Fawer
Herbert V. Larson

For the Government:

Frank Violanti
Nick Phillips

THE COURT: All right. The Court finds as a matter of fact that a grand jury has issued a subpoena to Randy Braswell in his capacity as president of two corporations, Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc. That subpoena requests the production of books and records relating to those two corporations for those four particular years. Worldwide Purchasing, Inc., is a corporation, the stock of which is owned entirely by Mr. Braswell. Worldwide Machinery Sales, Inc., is a corporation, the stock of which at one time was wholly owned

by Mr. Braswell but was transferred to Worldwide Purchasing, Inc., upon the organization of Worldwide Purchasing, Inc. Both corporations are viable corporations, apparently maintaining a current status with the State of Mississippi and apparently keeping current corporate books and records, including financial records and minutes and also filing corporate income tax returns.

Mr. Braswell prior to the incorporation of Worldwide Machinery Sales, Inc., in 1980 did business in the fields of trading in used heavy equipment and trading in real estate and trading in oil and gas properties individually in his own name; that all his assets, at least the overwhelming majority of his assets were transferred into Worldwide Machinery Sales, Inc., upon its incorporation, and he has thereafter done business in the corporate name; that business was later done in the corporate name of Worldwide Purchasing, Inc., rather than Worldwide Machinery Sales, Inc., when Worldwide Purchasing was organized. The extent to which Mr. Braswell has done business through these corporations is as near to total as the Court could imagine. He has taken title to all of his assets in the name of one or other of the corporations. He has even gone so far as to write his checks for personal expenditures, household expenditures, utilities, clothes, and other personal items on corporate checks, and his wife has testified that she uses credit cards issued in the name of one of the corporations for personal items such as clothes, jewelry, travel and the like.

The movant presented several witnesses, including his attorney, his banker, insurance agent, and a business partner who testified that he did business in the name of the corporation, but every one of them understood that they were dealing personally with Randy Braswell. The Court notes, however, that every one of them mentioned that business was placed in the name of one of the corporations rather than Randy Braswell individually, and that in regard to loans made by the banker, that Mr. Braswell had

to personally guarantee all loans, which is not unusual in the case of a small, closely held corporation.

Mr. Braswell in this capacity as president of the corporations has moved to suppress the subpoena under the act of production doctrine, claiming the Fifth Amendment privilege against self incrimination. He argues that the Court should consider in the case of closely held corporations as to whether they are truly organizations or collective entities under United States v. Doe, or whether the Court should look at closely held corporations and decide under Bellis v. United States as to whether they should be considered as not being organizations but in fact being the alter ego or true identity of the person who owns or controls them in the nature of sole proprietorships.

There is a conflict among the circuits in regard to this issue. The Second Circuit in the case of In Re Two Subpoena Duces Tecum, 769 F.2d 52, 1985, has taken the position that a bright-line test is the appropriate test so that the records of no corporation are entitled to this Fifth Amendment privilege. The Third Circuit has held otherwise. Other circuits have basically followed the reasoning of the Second Circuit, although a number of the cases are less than definitive.

This court, of course, is required to follow the precedent of the Fifth Circuit. The Fifth Circuit has considered this issue, at least indirectly, in two cases. One, In Re Grand Jury Subpoena, (Lincoln), 767 F.2d 1130, 1985, and in United States v. Huckaby, 776 F.2d 564, 1985. Movant argues that In Re Lincoln is distinguishable from the case here and certain language in it allows a factual approach as to whether a corporation can be a collective entity held in a representative capacity as opposed to a sole proprietorship. This Court does not read In Re Lincoln in that manner, and reads In Re Lincoln to hold directly that a corporation is not entitled under United States v. doe to

enjoy the Fifth Amendment privilege. The Fifth Circuit in United States v. Huckaby in footnote 7 does appear to reopen this question, if in fact it was directly decided in In Re Lincoln.

The Court notes in regard to Huckaby that the language addressing this question is contained in a footnote and is dicta. The Court also notes that the panel in Huckaby was made up of judges who were not on the panel in the case of In Re Lincoln. The Court further notes that this issue was addressed in In Re Grand Jury Subpoena, 85-W-71-5, 784 F.2d 857, Eighth Circuit, 1986. In that case the Eighth Circuit followed the reasoning of the Second Circuit and held that a closely held corporation is not entitled to the privilege. The United States Supreme Court granted writ of certiorari in this case. Obviously the issue is an important one as it has been addressed differently in different circuits, and since the United States Supreme Court has granted certiorari.

This Court will not try to set forth in detail an opinion substantiating the decision that it reaches, but merely holds that the reasoning of the the Second Circuit appears to be the best approach to this issue, that it appears to this Court that that is the reasoning accepted by the Fifth Circuit in In Re Lincoln, and that that is the reasoning which this Court will follow in this case. Accordingly, the Court will deny the motion to suppress the subpoena.

APPENDIX I

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

TO:

Randy Braswell, President
Worldwide Machinery Sales, Inc.
Worldwide Purchasing, Inc.

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
U.S. Post Office and Courthouse Jackson, MS	Grand Jury 5th Floor
	DATE AND TIME
	Sep. 15, 1986 9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

All books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985, to include, but not limited to, the following:

1. Receipts and disbursements journals.
2. General ledger and subsidiaries.

3. Accounts receivable/accounts payable ledgers, cards, and all customer data.
4. Bank records of savings and checking accounts, including statements, checks, and deposit tickets.
5. Contracts, invoices—sales and purchase, conveyances, and correspondence.
6. Minutes and stock books or ledgers.
7. Loan disclosure statements and agreements.
8. Liability ledgers.
9. Retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941.

x *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK

/s/Clarence A. Pierce

(BY) DEPUTY CLERK

DATE

Aug. 20, 1986

This subpoena is issued on application of the United States of America

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Frank J. Violanti, Asst. U.S. Atty
P. O. Box 1417, Biloxi, MS 39533
601-432-5521

ADDITIONAL INFORMATION

NOTE: In the alternative, you are commanded to deliver the subpoenaed documents to the agent serving this subpoena, in which event you need not appear or bring the subpoenaed documents at the location, date and time specified above.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-3

In the Supreme Court of the United States

OCTOBER TERM, 1987

RANDY BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the custodian of records of a corporation may resist a subpoena for those records on the ground that the act of producing them would violate his personal privilege against compulsory self-incrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-3

RANDY BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-11a) is reported at 814 F.2d 190.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1987. A suggestion for rehearing en banc, which the panel treated as a petition for panel rehearing, was denied on April 30, 1987 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on June 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Ordinarily, a suggestion for rehearing en banc, when not accompanied by a petition for rehearing, does not extend the time to petition for a writ of certiorari. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 313 (6th ed. 1986). But for the panel's decision to treat the suggestion as a petition for panel rehearing, therefore, the petition for a writ of certiorari would be out of time under Rule 20 of the Rules of this Court. It appears, however, that the Fifth Circuit,

STATEMENT

1. Petitioner is the president and sole shareholder of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc. From 1965 to 1980, petitioner conducted his business, which includes the sale and purchase of equipment, oil and gas interests, and land and timber, as a sole proprietorship. In 1980, he incorporated Worldwide Machinery, a Mississippi corporation, and began conducting his business through that entity. In 1981, he incorporated Worldwide Purchasing, also a Mississippi corporation, out of concern that the name "Worldwide Machinery" did not adequately reflect the variety of his pursuits (Pet. App. 7a).

Petitioner funded Worldwide Purchasing with the stock he held in Worldwide Machinery, and he retained ownership of 100 percent of the stock of Worldwide Purchasing. Both companies are active corporations, maintaining a current status with the State of Mississippi, keeping current corporate books and records, including financial records and minutes, and filing corporate tax returns. Petitioner, his wife, and his mother are directors of both corporations. According to petitioner, however, neither his wife nor his mother has any authority over the business affairs of the corporations, although they are secretary-treasurer and vice-president of the corporations, respectively (Pet. App. 7a).

2. On August 20, 1986, a federal grand jury sitting in the Southern District of Mississippi subpoenaed the books

through its Internal Operating Procedures, allows a party to seek panel rehearing through a suggestion for rehearing en banc without the need to file a petition for panel rehearing. See 5th Cir. R. App. IV, Loc. R. 35, I.O.P. ("A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed.").

and records of Worldwide Purchasing and Worldwide Machinery.[2] The subpoena permitted delivery of the subpoenaed documents to the agent serving the subpoena (Pet. App. 7a-8a) and thus did not require petitioner to testify.

Petitioner moved to quash the subpoena, arguing that the act of producing the subpoenaed records would incriminate him in violation of his Fifth Amendment privilege against compulsory self-incrimination. The district court denied the motion (Pet. App. 17a-20a). Relying on the Fifth Circuit's decision in *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130 (1985), the court held (Pet. App. 19a-20a) that the custodian of records of a collective entity, such as a corporation, has no Fifth Amendment privilege to refuse to comply with a subpoena for those records. The court rejected petitioner's contention that the so-called collective entity rule should not apply here because petitioner's business was a purported one-man operation (*ibid.*).

Petitioner subsequently appeared before the grand jury but refused to produce the subpoenaed documents. On motion of the government, the district court held petitioner in contempt and ordered him committed to the custody of the United States Marshal until he complied

[2] The subpoena requested " 'all books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985, to include, but not limited to the following: (1) receipts and disbursements journals; (2) general ledger and subsidiaries; (3) accounts receivable/accounts payable ledgers, cards, and all customer data; (4) bank records of savings and checking accounts, including statements, checks, and deposit tickets; (5) contracts, invoices—sales and purchase, conveyances, and correspondence; (6) minutes and stock books and ledgers; (7) loan disclosure statements and agreements; (8) liability ledgers; (9) retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941.' " Pet. App. 8a n.1; see *id.* at 21a-22a.

with the court's order (Pet. App. 13a). The district court, however, stayed the commitment pending appeal (*id.* at 12a).

3. The court of appeals affirmed (Pet. App. 6a-11a). The court followed its prior decision in *Lincoln*, although it noted (*id.* at 10a-11a) the existence of a conflict among the circuits on the issue of whether a custodian of corporate records may resist a subpoena for those records on Fifth Amendment grounds. Relying on *Bellis* v. *United States*, 417 U.S. 85, 100 (1974), the court rejected petitioner's argument based on the size of his corporations, stating (Pet. App. 10a) that "corporations, no matter how small, are collective entities."

The court of appeals denied a motion for a stay of the mandate pending the filing of a petition for a writ of certiorari (Pet. App. 3a). On June 10, 1987, Justice White entered an order staying the mandate of the court of appeals pending the disposition by this Court of a petition for certiorari (*id.* at 1a).

DISCUSSION

Petitioner renews his contention that he has a Fifth Amendment privilege to refuse to comply with the subpoena for corporate records.

This Court repeatedly has held that the "books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian." *Curcio* v. *United States*, 354 U.S. 118, 122 (1957); see also, *e.g.*, *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976); *Bellis* v. *United States*, 417 U.S. at 88; *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911).[3] In so holding, the Court has

[3] The Court has stated in the clearest possible terms that this rule applies to corporations such as petitioner's: "It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be" (*Bellis*, 417 U.S. at 100). Petitioner, however, finds this language from *Bellis* "not at all clear" (Pet. 16), and one court of appeals, without discussing this language from *Bellis*, appears to have based its departure from the traditional collective entity rule on a distinction between one-man corporations and others. *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569, 573 (11th Cir. 1987), stay denied *sub nom. Roberts* v. *United States*, No. A-770 (Apr. 27, 1987).

reasoned that, because the custodian holds the records in a purely representative capacity on behalf of the corporation, production of the records is not a personal testimonial act of the custodian implicating his Fifth Amendment rights (see, *e.g.*, *Bellis*, 417 U.S. at 90). If the law were otherwise, the custodian could prevent the government from obtaining the records of his corporation despite the settled rule that corporations and other collective entities have no Fifth Amendment privilege (*ibid.*). As a result, the very purpose of the "collective entity" rule—to facilitate government regulation of corporations and other artificial entities—would be defeated.

In 1984, in *United States* v. *Doe*, 465 U.S. 605, the Court held that the production of business records by a sole proprietor may be a testimonial act protected by the Fifth Amendment. Unlike a corporation, however, a sole proprietorship is not a collective entity, and nothing in the *Doe* opinion even faintly purported to reject the collective entity rule. Nevertheless, as both petitoner (Pet. 12-13) and the court below (Pet. App. 10a-11a) point out, in the wake of *Doe* the courts of appeals have adopted differing approaches to the question of the continuing validity of the rule.

Several circuits, including the court below in this case and in *Lincoln*, have reaffirmed the traditional rule, holding that a custodian of corporate records may not invoke his Fifth Amendment privilege to refuse to comply with a subpoena for those records. See *In re Grand Jury*

Subpoena, 784 F.2d 857 (8th Cir. 1986), cert. granted *sub nom. See* v. *United States*, No. 85-1987 (Oct. 6, 1986), cert. dismissed (Jan. 15, 1987); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985) (en banc), cert. denied, No. 85-658 (Dec. 16, 1985); *United States* v. *Malis*, 737 F.2d 1511 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

On the other hand, four circuits—although they differ considerably with one another in approach—hold, contrary to the traditional rule, that there are at least some limited circumstances in which a custodian of corporate records may resist a subpoena on the basis of his personal Fifth Amendment privilege. See *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, *supra*; *United States* v. *Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986), cert. denied, No. 86-420 (Dec. 1, 1986); *United States* v. *Antonio J. Sancetta, M.D., P.C.*, 788 F.2d 67, 74 (2d Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc). Of course, *no* circuit allows a corporation to resist production of its records altogether through the custodian's personal privilege; the four circuits that permit the custodian to invoke his personal privilege all hold that, if the government so requests, the corporation must produce the records through some other person. See, *e.g.*, *In re Special Federal Grand Jury Empanelled October 31, 1985*, 819 F.2d 56, 57 n.1 (3d Cir. 1987); *Roberts*, 816 F.2d at 573-574; *Lang*, 792 F.2d at 1240-1241; *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985). As the Second Circuit stated in *Two Grand Jury Subpoenae*, "[t]here simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records" (*ibid.*).

In the present case, the subpoena is directed to petitioner personally, and the court of appeals, applying the traditional rule, upheld the subpoena on that basis. Cf.

Roberts, 816 F.2d at 573-574. Although petitioner has yet to demonstrate how his act of production would be self-incriminatory, the ruling of the court of appeals is based on the traditional rule that custodians may not invoke the Fifth Amendment in response to a subpoena for corporate records and not on findings about the incriminating nature vel non of the act of production in this case. Cf. *Lang*, 792 F.2d at 1241-1242. Therefore, even though it correctly applies the rule set down in this Court's cases, the decision of the court of appeals is in clear conflict with the decisions of other circuits, and we do not oppose the petition for certiorari. We note that this Court previously granted certiorari in another case raising the same issue, but that case later was dismissed by agreement of the parties. *See* v. *United States*, No. 85-1987 (Jan. 15, 1987).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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fn. 13. No such evidentiary showing has been made in this case.[21]

Simply stated, Braswell is at the center of a criminal investigation which is now over two years old, and one which is being pursued vigorously. In reality, it would appear that the Government is keenly aware of the testimonially incriminating aspects of Braswell's situation, or it would have simply immunized him for the act of production long ago.

If the Government wants access to the subpoenaed documents for purposes of pursuing its criminal investigation of Braswell, and it insists on obtaining them from him, then its only recourse is to grant him statutory use immunity (18 U.S.C. § 6002-03) with respect to the potentially incriminating evidence stemming from his production of the records. *Kastigar v. United States*, 406 U.S. 441 (1972): cf. *Curcio*, at 123-124. As this Court has made clear, oral assurances or constructive use immunity are not acceptable alternatives. *Doe* at 616.

Several lower courts confronted with a corporate custodian's assertion of the act of production privilege have accommodated the individual custodian's constitutional privilege with the Government's right to access to corporate records, by directing the corporation to appoint another officer or an independent third party to produce the subpoenaed records. See, *In Re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2nd Cir. 1985);

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[21] If the Government should now seek to rebut Braswell's assertion of the act of production privilege on the grounds that the evidentiary admissions inherent in the production are a "foregone conclusion" (which it has not suggested to date), then a remand for this limited purpose might be appropriate.

U. S. v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74-75 (2nd Cir. 1986); and *U. S. v. Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986). Whether this is a solution in certain cases is beside the point; it is not a solution in this case, unless Braswell's act of production privilege extends to that which he would be called upon to communicate to the surrogate. *Kastigar* at 460, *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963).

Affording Braswell the right to assert the act of production privilege would afford him exactly the same constitutional protection given the recipient of the subpoena in *Doe*. On a practical level, it would appear Doe's business was a far larger and more impersonal entity than is Braswell's. See: *In re Grand Jury Empanelled March 19, 1980*, 541 F.Supp. 1, (D.N.J., 1981), aff'd 680 F.2d 327 (3rd Cir. 1982) *cert. granted sub nom. United States v. Doe*, 465 U.S. 605 (1984). The only difference is that Doe operated as a sole proprietorship while Braswell chose the corporate form for reasons wholly unrelated to the benefits attendant to incorporation. *Supra*, at pp. 10-12. The broad subpoenas issued to them called for the production of virtually the same types of records in grand jury investigations of suspected wrongdoing by each of them in their individual capacities.

It is disingenuous to suggest that the testimonial aspects of producing the subpoenaed documents might incriminate Doe individually, but not Braswell. The fact is, *in this case*, that the latter is the corporation. Proof of this fact, coupled with Braswell's compelled production of the corporate records, even if made in his "representative" capacity, would permit any lay trier-of-fact to draw each of the adverse evidentiary inferences which this Court has found to be protected by the Fifth Amendment. *Fisher*

at 410-413, *Doe* at 612-13.[22] To conclude, as did the Sixth Circuit in identical circumstances, that Braswell's "production of the records is not a testimonial act of the custodian [and] . . . communicates nothing more than the fact that the one producing them is a representative of the corporation . . . [23] is truly to exalt form over substance and to disregard the realities of the courtroom.

The Government has already acknowledged before this Court the potential danger of self-incrimination to the individual custodian in such a situation.[24] Surely, the Government is not to be permitted to do indirectly in this case what it is constitutionally barred from doing directly.

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[22] It is unrealistic to think that a trial judge's limiting instruction could cure the prejudice. *Cf., Bruton v. United States,* 391 U.S. 123, 129 (1968).

[23] *In Re Grand Jury Proceedings (Morganstern),* 771 F.2d 143, 148 (6th Cir. 1985), (*en banc*), *cert. denied,* — U.S. —, 106 S.Ct. 594 (1985).

[24] In *See v. United States,* 85-1987 *cert. granted,* — U.S. —, 107 S.Ct. 59 *cert. dismissed* — U.S. —, 107 S.Ct. 918 (1987) the Government urged as a reason for permitting it to obtain corporate records in the hands of an attorney, the greater protection thereby afforded the individual custodian. In doing so the Government argued: "If the documents are obtained from anyone other than the individual's attorney, the person producing the documents may be questioned about how he received the documents, since there is no privilege not to be incriminated by someone else." Brief for the United States at pp. 26-27, footnote 20.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court is respectfully urged to frame its opinion and decree so as to reverse the opinion of the United States Court of Appeals for the Fifth Circuit, the Judgment and Commitment Order of the district court, and to uphold petitioner Randy Braswell's Motion to Quash the Subpoena Duces Tecum issued by the federal grand jury.

Respectfully submitted, this 3rd day of December, 1987.

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RESPONDENT'S

BRIEF

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No. 87-3 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1987

RANDY BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the custodian of a corporation's records may resist a subpoena for those records on the ground that his act of producing them would violate his personal privilege against compulsory self-incrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-3

RANDY BRASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 19-25) is reported at 814 F.2d 190.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1987. A suggestion for rehearing en banc, which the panel treated as a petition for rehearing, was denied on April 30, 1987 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on June 26, 1987, and was granted on October 5, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the president and sole shareholder of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc. (J.A. 19). From 1965 to 1980, petitioner conducted his business, which includes the sale

and purchase of equipment, oil and gas interests, and land and timber, as a sole proprietorship. In 1980, he incorporated Worldwide Machinery, a Mississippi corporation, and began conducting his business through that entity. In 1981, he incorporated Worldwide Purchasing, also a Mississippi corporation, out of concern that the name "Worldwide Machinery" did not adequately reflect the variety of his pursuits. J.A. 20.

Petitioner funded Worldwide Purchasing with the stock he held in Worldwide Machinery, and he retained ownership of 100 percent of the stock of Worldwide Purchasing. Both companies are active corporations, maintaining a current status with the State of Mississippi, keeping current corporate books and records, including financial records and minutes, and filing corporate tax returns. J.A. 20. The corporations employ at least one person other than petitioner—a secretary, who is petitioner's sister-in-law (Pet. Br. 5). Petitioner, his wife, and his mother are directors of both corporations. According to petitioner, however, neither his wife nor his mother has any authority over the business affairs of the corporations, although they are secretary-treasurer and vice-president of the corporations, respectively (J.A. 20-21).

2. On August 20, 1986, a federal grand jury sitting in the Southern District of Mississippi subpoenaed the books and records of Worldwide Purchasing and Worldwide Machinery.[1] The subpoena permitted delivery of the subpoenaed documents to the agent serving the subpoena (J.A. 21) and thus did not require petitioner to testify.

[1] The subpoena requested "all books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985, to include, but not limited to the following: (1) receipts and disbursements journals; (2) general ledger and subsidiaries; (3) accounts receivable/accounts payable ledgers, cards, and all customer data; (4) bank records of savings and checking accounts, including statements, checks, and deposit tickets; (5) contracts, invoices—sales and purchase, conveyances, and correspondence; (6) minutes and stock books and ledgers; (7) loan disclosure statements and agreements; (8) liability ledgers; (9) retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941." J.A. 21 n.1; see J.A. 6-7.

Petitioner moved to quash the subpoena, arguing that the act of producing the subpoenaed records would incriminate him in violation of his Fifth Amendment privilege against compulsory self-incrimination. The district court denied the motion (J.A. 10-14, 15-16). Relying on the Fifth Circuit's decision in *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130 (1985), the court held (J.A. 12-14) that the custodian of records of a collective entity, such as a corporation, has no Fifth Amendment privilege to refuse to comply with a subpoena for those records. The court rejected petitioner's contention that the so-called "collective entity rule" should not apply here because petitioner's business was a purported one-man operation (J.A. 12).

Petitioner subsequently appeared before the grand jury but refused to produce the subpoenaed documents. On motion of the government, the district court held petitioner in contempt and ordered him committed to the custody of the United States Marshal until he complied with the court's order (J.A. 17-18). The district court, however, stayed the commitment pending appeal (Pet. App. 12a).

3. The court of appeals affirmed (J.A. 19-25). The court followed its prior decision in *Lincoln*, although it noted (J.A. 24-25) the existence of a conflict among the circuits on the issue of whether a custodian of corporate records may resist a subpoena for those records on Fifth Amendment grounds. Relying on

Bellis v. *United States*, 417 U.S. 85, 100 (1974), the court rejected petitioner's argument based on the size of his corporations. The court stated (J.A. 23) that "corporations, no matter how small, are collective entities." On June 10, 1987, Justice White entered an order staying the mandate of the court of appeals pending the disposition by this Court of the petition for certiorari (Pet. App. 1a).

SUMMARY OF ARGUMENT

A. Petitioner explicitly disclaims any argument that the Fifth Amendment protects against disclosure of the contents of corporate records. He argues, however, that an individual in possession of corporate documents may interpose his own personal Fifth Amendment privilege to resist producing those documents on the ground that the individual's act of production would be both incriminatory and testimonial in nature. Petitioner asks this Court to overrule the "collective entity rule," which holds that a custodian may not block access to corporate documents on the basis of his personal privilege. That rule was established in 1911 and has been reaffirmed repeatedly, most recently in *Fisher* v. *United States*, 425 U.S. 391 (1976). The collective entity rule, which is of enormous importance in the investigation and prosecution of white-collar crime, complements the undisputed principle that the corporation itself has no privilege against incriminating itself or its officers or employees.

The collective entity rule is as valid today as it has been throughout the past 75 years. It precludes Fifth Amendment privilege claims based on the allegedly incriminating nature of the act of producing documents as well as Fifth Amendment privilege claims based on the allegedly incriminating contents of the documents. The rule is best explained by the recognition, prominent in this Court's past decisions, that a corporate custodian acts as the agent of the corporation and not as an individual when he produces documents; his freedom from compelled *self*-incrimination does not protect him against incrimination by the corporation's act of producing documents. Consistent with that rationale, the government may be precluded from treating the act of production as an individual rather than a corporate act in any subsequent proceeding. The government may, however, make use—even against the corporate custodian—of the corporation's act of production to show the authenticity of the documents, their existence, and their possession by the corporation.

B. This Court should not reach two issues discussed in petitioner's brief but not decided by the courts below: whether the "facts and circumstances" of this particular case show a realistic likelihood of incrimination through the act of production and, if so, whether it would be permissible to require the corporations to find or appoint someone other than petitioner to produce the records. If, as we contend, the court of appeals correctly held that the collective entity rule precludes petitioner from asserting any personal Fifth Amendment privilege in this case, then this Court need not reach those two issues in order to affirm. If this Court were instead to disagree with the court of appeals, then the issues discussed in petitioner's brief would become relevant, but those issues should in that event be addressed in the first instance by the lower courts on remand, not by this Court.

Although we do not believe that this Court should address those two issues, we do note some critical flaws in petitioner's analysis of them. Petitioner's claim that he would be incriminated by the act of producing corporate documents improperly rests on the *contents* of those documents and not on what the

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act of producing them would tell the government. And petitioner's claim that a court may not require that someone else be designated to produce the corporate documents is contrary to the view of every federal court of appeals and would in effect overturn the rule that corporations have no Fifth Amendment privilege against compulsory self-incrimination.

ARGUMENT

THE CUSTODIAN OF A CORPORATION'S RECORDS MAY NOT RESIST A SUBPOENA FOR THOSE RECORDS ON THE GROUND THAT HIS ACT OF PRODUCING THEM WOULD VIOLATE HIS PERSONAL PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

The issue in this case is whether the Fifth Amendment protects petitioner from being required to produce the records of Worldwide Purchasing and Worldwide Machinery. Petitioner explicitly "does not claim that the Fifth Amendment protects against the disclosure of the contents of [the] records" of Worldwide Purchasing and Worldwide Machinery (Pet. Br. 7; see also *id.* at 12). Such a claim would be unavailing in view of this Court's decisions holding that the Fifth Amendment does not protect the contents of business records voluntarily prepared before the subpoena for them was issued. *United States* v. *Doe*, 465 U.S. 605 (1984); *Fisher* v. *United States*, 425 U.S. 391 (1976). Rather, petitioner argues that the Fifth Amendment forbids compelling his act of producing the subpoenaed documents because that act would incriminate him, in that it would implicitly acknowledge the existence of the subpoenaed documents, their authenticity, and his possession and control of them. That argument, however, is foreclosed by this Court's decisions that have repeatedly held that a custodian of corporate records such as

petitioner has no Fifth Amendment privilege to refuse to comply with a subpoena for those records. Petitioner suggests that this Court has implicitly abandoned that line of authority, and that in any event that line of authority does not extend to a case in which the basis of the Fifth Amendment claim is that the act of production is self-incriminatory. Neither suggestion is convincing.

A. The Collective Entity Rule Remains Valid and Applies to this Case

1. *The Collective Entity Rule Is an Important and Well-Established Principle of Fifth Amendment Law*

a. Petitioner argues that a custodian of corporate documents may refuse to produce those documents on the ground that the testimonial component of the act of production would incriminate him. This Court, however, has repeatedly upheld subpoenas against the custodians of documents belonging to corporations or other collective entities. The Court has done so in the face of claims that the documents will incriminate the custodian, and "despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor." *Fisher*, 425 U.S. at 411-412. That "collective entity rule" applies directly to this case, for the Court has stated in the clearest possible terms that it applies to corporations such as Worldwide Purchasing and Worldwide Machinery: "It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Bellis* v. *United States*, 417 U.S. 85, 100 (1974); see *Grant* v. *United States*, 227 U.S. 74 (1913) (applying collective entity rule to

records of a defunct corporation that at all times had only one shareholder).[2]

This Court has often stated the collective entity rule in terms similar to those employed in *Bellis*: "no privilege can be claimed by the custodian of corporate records" (417 U.S. at 100). Petitioner, however, seeks to engraft onto all such statements a limiting construction under which they mean only that no privilege can be claimed by the custodian of corporate records *as to the contents of those records.* If he succeeds, there will be nothing left of the collective entity rule, for *Fisher* and *Doe* make it clear that, entirely apart from the collective entity rule, no one may claim a privilege as to the contents of

[2] Petitioner argued in the court of appeals (C.A. Br. 12, 19-21), and in his petition for a writ of certiorari (Pet. 16-17) that the collective entity rule does not apply to this case because Worldwide Purchasing and Worldwide Machinery are not collective entities. Indeed, that was petitioner's primary argument in the court of appeals; his brief declared that it was "fine with" him (C.A. Br. 19) to apply an analytic framework under which, "if the individual holds the records of a collective entity in a representative capacity, * * * no privilege will be recognized" (*ibid.*). Petitioner appears to have abandoned that argument in this Court, however. The portion of petitioner's brief that attempts to distinguish or to repudiate the collective entity rule (*id.* at 11-40) makes no mention of the argument that Worldwide Purchasing and Worldwide Machinery are not collective entities; petitioner is in fact emphatic that his argument applies to "[t]he Fifth Amendment rights of *any* records custodian, for any entity, albeit huge corporation, one-man corporation, or sole-proprietorship" (*id.* at 40; see also *id.* at 9; NACDL Br. 12-13 (argument applies to "custodian of documents of any organization—regardless of size")). Therefore we, like petitioner and amicus, will focus our arguments on the question whether the collective entity rule applies to an attempt to invoke the Fifth Amendment on act-of-production grounds, and not on whether petitioner's corporations are otherwise exempt from the rule.

voluntarily prepared business records. Thus, by arguing that the "act-of-production" doctrine should be extended to corporate custodians, petitioner is in effect asking this Court to overrule the collective entity rule altogether.

The step that petitioner asks this Court to take is a large one indeed. The collective entity rule dates back to 1911, when the Court recognized the rule in the seminal case of *Wilson* v. *United States*, 221 U.S. 361 (1911). Since that time, the Court has reaffirmed the collective entity rule "time and again" (*Fisher*, 425 U.S. at 411).

The predicate for the collective entity rule is the even older rule that the privilege against compelled self-incrimination extends only to natural persons, not to corporations. That rule, first articulated in *Hale* v. *Henkel*, 201 U.S. 43 (1906), is as settled as any principle of Fifth Amendment law. See *Bellis*, 417 U.S. at 90; *United States* v. *Kordel*, 397 U.S. 1, 7 & n.9 (1970); *George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288-289 (1968); *Wheeler* v. *United States*, 226 U.S. 478, 489 (1913).[3] Because a corporation cannot invoke the privilege on its own behalf, and because the privilege may be invoked only by the party who is subject to incrimination (*Hale* v. *Henkel*, 201 U.S. at 69-70), it is clear that a corporation cannot invoke the Fifth Amendment to protect against the incrimination of any natural per-

[3] In order for the collective entity rule to apply, it is sufficient (*Bellis*, 417 U.S. at 100) but not necessary (*id.* at 89) that the artificial entity in question be a corporation. Thus, the Court has held that the Fifth Amendment privilege may not be asserted as to the records of labor unions, *United States* v. *White*, 322 U.S. 694, 700 (1944); political parties, *Rogers* v. *United States*, 340 U.S. 367, 371-372 (1951); or business partnerships, *Bellis* v. *United States*, *supra*.

son, including the corporation's officers and employees.

What remained to be decided after *Hale* was whether an individual could refuse to produce corporate records on the ground that he would incriminate *himself*. In *Wilson* and its companion case, *Dreier* v. *United States*, 221 U.S. 394 (1911), the Court held that he could not. The Court stated in *Wilson*, 221 U.S. at 384: "The appellant held the corporate books and records subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures." Summarizing *Wilson*, the Court added in *Dreier* (221 U.S. at 400): "Dreier was not entitled to refuse the production of the corporate records. By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under obligation to produce them when called for by proper process."

The collective entity rule has become firmly entrenched in this Court's jurisprudence. Since *Wilson*, this Court has reaffirmed the rule on at least 11 occasions, and not a single Justice has questioned the rule.[4] As recently as 1976—in the very case that

[4] See *Wheeler*, 226 U.S. at 489-490; *Grant*, 227 U.S. at 79-80; *Essgee Co.* v. *United States*, 262 U.S. 151, 155-158 (1923); *United States* v. *White*, 322 U.S. 694 (1944); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 205-206, 208, 210 (1946); *Rogers* v. *United States*, 340 U.S. 367, 371-372 (1951); *Curcio* v. *United States*, 354 U.S. 118, 122-125, 128 (1957); *McPhaul* v. *United States*, 364 U.S. 372, 380 (1960); *George Campbell*, 392 U.S. at 288-289; *Bellis*, 417 U.S. at 89-92; *Fisher*, 425 U.S. at 408, 411-412, 413 & n.14. Not all of those decisions were unanimous, but in each case the dissent either specifically endorsed the collective entity rule (see, *e.g.*,

petitioner claims demonstrates that "[a]ny determination of the availability of a Fifth Amendment privilege which is a function of the entity whose records are sought * * * is simply unworkable" (Pet. Br. 39-40)—the Court reaffirmed that "neither a [collective entity] nor the individual [representatives of the entity] are shielded from compelled production of * * * records [of the entity] on self-incrimination grounds" (*Fisher*, 425 U.S. at 408).[5]

b. Besides being well established, the collective entity rule is extremely important. Grand jury subpoenas for corporate documents provide invaluable assistance in the detection and prosecution of white-collar crime, which has been called "the most serious and all pervasive crime problem in America today."[6] As this Court has recognized, "[t]he greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the offi-

McPhaul, 364 U.S. at 387; *George Campbell*, 392 U.S. at 290) or took issue with the majority on other grounds without discussing the validity of the collective entity rule. Justice McKenna dissented alone in the *Wilson* case, but he subsequently joined the Court's opinions in *Wheeler*, *Grant*, and *Essgee*, all of which reaffirmed the holding of *Wilson*.

[5] Justice Brennan and Justice Marshall, in separate opinions, took issue with the majority opinion in *Fisher* in several respects, but they explicitly agreed with the Court that a custodian of the records of a collective entity may not claim his privilege as a ground for refusing to produce the entity's records. 425 U.S. at 426, 430 n.9 (Brennan, J., concurring in the judgment); *id.* at 432 (Marshall, J., concurring in the judgment).

[6] Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980). The annual cost of white-collar crime is estimated to be between $40 billion and $200 billion, in contrast to the annual cost of $4 billion attributable to crimes against property (*id.* at 288, 297).

cial records and documents of that organization." *White*, 322 U.S. at 700. "Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible" (*ibid.*; accord *Bellis*, 417 U.S. at 90-91). "If * * * an officer or employé of a corporation * * * could refuse to produce the [corporation's] books and documents * * * it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers" (*Hale*, 201 U.S. at 74).[7]

Detection of white-collar crime often depends not only on obtaining access to documents, but also on comparing large numbers of facially innocuous documents to discern a pattern that gives rise to an inference of illegal behavior.[8] Accordingly, broad subpoenas for large and sometimes general categories of documents—exactly the kind of subpoenas that courts have been reluctant to enforce over a claim of act-of-production privilege—are often the only means by

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[7] "Groups frequently are powerful and their illegal doings frequently are provable only by their records; and, since economic crimes (as contrasted with common law crimes) are usually not even *discoverable* without access to business records, a rule which privileged the production of such records whenever they incriminated the custodian would result in many (rather than few) of the violators going free." 8 J. Wigmore, *Evidence* § 2259b, at 360-361 (J. McNaughton rev. ed. 1961). See generally Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After* Fisher *and* Doe, 54 Fordham L. Rev. 935, 935-936 (1986).

[8] See Applegate, *The Business Papers Rule: Personal Privacy and White Collar Crime*, 16 Akron L. Rev. 189, 195-198 (1982); Vaira, *Use of the Grand Jury to Obtain Business Records*, 59 Chi. B. Rec. 32 (1977).

which crime can be detected.[9] In sum, the abolition of the collective entity rule, and the recognition of a privilege on the part of custodians of corporate documents, would have a devastating impact on one of the most important areas of law enforcement.

c. In seeking to justify abolition of the collective entity rule, a few commentators and one court have asserted—contrary to the foregoing analysis—that the recognition of an act-of-production privilege for corporate custodians "would not * * * markedly frustrate the Government's investigation of possible criminal offenses or its enforcement of criminal provisions" (*In re Sealed Case*, 832 F.2d 1268, 1282 (D.C. Cir. 1987), (footnote omitted)). Petitioner briefly echoes this theme (Pet. Br. 35-36). The argument is based on two premises: that the government's ability to obtain the corporate records by immunizing the custodian's act of production under the federal immunity statute, 18 U.S.C. 6002-6003, is a fully adequate substitute for the unimmunized compulsion of production, and that the government's ability to obtain the corporate records merely by addressing the subpoena to the corporation also serves all of the government's legitimate interests (see *In re Sealed Case*, 832 F.2d at 1281-1282).[10] Both premises founder against the reality of subpoena practice.

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[9] Applegate, *supra*, 16 Akron L. Rev. at 198; Heidt, *The Fifth Amendment Privilege and Documents—Cutting* Fisher's *Tangled Line*, 49 Mo. L. Rev. 439, 488 (1984).

[10] Amicus National Association of Criminal Defense Lawyers makes a different argument in an effort to show that abolition of the collective entity rule will not devastate the government's ability to detect and prosecute white-collar crime. Amicus contends that in only a "small number of cases" will use immunity be required as a prerequisite to compulsion of the custodian's production of the records (NACDL

Grants of immunity could have a severe impact on the government's ability to detect and prosecute corporate crime. Act-of-production immunity might not be troublesome if it meant only that the government could not make evidentiary use of the custodian's tacit acknowledgment that the documents produced under a grant of immunity existed, were in his possession, and were the documents described in the subpoena. Use immunity, however, normally involves a much more sweeping prohibition: it bars the government from making any derivative use of immunized testimony in its investigation of crime. *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972); see also *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 255 (1983).

Because of the difficulties of proving at trial that immunized testimonial conduct was not directly or indirectly used in the investigation, it has been noted that "the prohibition against derivative use may have disastrous consequences for the prosecution" (Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 63 (1986))

Br. 4), apparently because amicus believes that the custodian's claim of self-incrimination will fail on its merits in most cases. If that is so, then one must wonder why this issue has arisen in at least 17 published opinions of the courts of appeals just since 1984 (see Pet. Br. 31-32 n.11). The answer, of course, is that *every* corporate custodian with sufficient ingenuity can come up with a way to contend that the very act of producing records would somehow incriminate him, especially if it suffices to argue, as petitioner does, that "compliance with the subpoena would compel [the custodian] * * * to disclose the very existence of particular documents of which the Government is ignorant" (*id.* at 42). *Every* subpoena, except the hypothetical one that identifies each requested document with such specificity as to render it unique, potentially *could* compel the custodian to reveal the "existence of particular documents of which the Government is ignorant."

and that "this alternative may preclude prosecution of the claimant" (Heidt, *supra*, 49 Mo. L. Rev. at 482 n.172). See also Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1, 40 (1987) (arguing that act-of-production immunity "is broad and far-reaching"). For example, when an immunized witness produces documents, but the documents do not show on their face that they are the documents described in the subpoena, the witness has made a tacit statement concerning the nature of the documents. That "statement" may be a valuable investigative lead.[11] Yet, if the corporate representative must be granted act-of-production immunity, including derivative immunity, in exchange for compelling him to produce corporate documents, the government may be foreclosed from following up on that investigative lead unless it is willing to forgo using subsequently uncovered evidence against the immunized witness. See Alito, *supra*, 48 U. Pitt. L. Rev. at 63-64. As a consequence, the price of obtaining corporate records, when the records are in the possession of a corporate representative who is suspected of involvement in criminal conduct, may be to exempt the corporate representative from prosecution, or at least to make

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[11] As we explain in the next section, if the witness is a custodian of corporate documents, the government is entitled to that investigative lead under the collective entity rule, even though the particular individual whose knowledge is tacitly communicated by the production of the document may be incriminated by that tacit communication. Although the government cannot compel that individual to provide certain kinds of *oral* testimony (see *Curcio* v. *United States*, *supra*), the government is entitled to learn what the corporation knows (see *United States* v. *Kordel*, 397 U.S. 1, 8 (1970)), and the corporation—through the individual acting on its behalf—knows that the document fits within the categories described in the subpoena.

investigation and prosecution of such a representative even more difficult than it has been in the past.[12]

The other argument sometimes advanced to show that abolition of the collective entity rule will not harm the investigation of crime is that the government can always obtain corporate records merely by addressing the subpoena to the corporation rather than to an individual because the corporation "must find some means by which to comply because no Fifth Amendment defense is available to it" (*In re Sealed Case*, 832 F.2d at 1282 n.9; see also *id.* at 1278). Therefore, the argument runs, the government always has a means to obtain corporate records *without* granting anyone use immunity—it need only allow the corporation to select the individual who will physically produce them. Although we agree with the unanimous view of the courts of appeals that this is a constitutionally valid way for the government to obtain records,[13] we do not share the District

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[12] Grants of act-of-production immunity would be especially problematic if, as one commentator has recently suggested, such immunity precludes the government from using the *contents* of the subpoenaed records against the individual who produced them under a grant of immunity. See Mosteller, *supra*, 73 Va. L. Rev. at 43; cf. *In re Sealed Case*, 791 F.2d 179 (D.C. Cir. 1986) (leaving question open), cert. denied, No. 86-312 (Oct. 20, 1986). Fortunately, this Court has already rejected that proposition. See *Doe*, 465 U.S. at 617 n.17. Indeed, petitioner concedes that the government, once it obtained corporate documents under a grant of act-of-production immunity, "'could then use the contents against any officer of the company, including the person to whom immunity was granted.'" Pet. Br. 35 (quoting Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv. L. Rev. 640, 649-650 (1986)).

[13] *In re Sealed Case*, 832 F.2d at 1278, 1282 & n.9; *United States* v. *Antonio J. Sancetta, M.D., P.C.*, 788 F.2d 67, 74

of Columbia Circuit's optimism that it will always be an effective way.

Consider, for example, the case of a defunct corporation (or a corporation disbanded in anticipation of or in response to a subpoena). It generally will not be possible to address a subpoena to that disbanded legal entity, as opposed to some natural person holding its records. Yet the traditional collective entity rule permits the government to obtain corporate records in that situation by directing the subpoena to the individual who had been the corporation's sole shareholder. *Bellis*, 417 U.S. at 88 ("no Fifth Amendment privilege could be claimed with respect to corporate records even though the corporation had previously been dissolved.")

Suppose, however, that that rule were abolished, as petitioner suggests it should be. The government would no longer be able to address the subpoena to the

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(2d Cir. 1986) (one-person corporation); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) ("[t]here simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records"); *In re Special Federal Grand Jury Empanelled October 31, 1985*, 819 F.2d 56, 57 n.1 (3d Cir. 1987); *United States* v. *Rogers Transp., Inc.*, 793 F.2d 557, 558 (3d Cir. 1986) (one-person corporation); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 529 & n.4 (3d Cir. 1985) (en banc); *United States* v. *Lang*, 792 F.2d 1235, 1240-1241 (4th Cir. 1986), cert. denied, No. 86-420 (Dec. 1, 1986); *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569, 573 (11th Cir. 1987) (one-person corporation). These are the decisions on point of the five circuits that allow a corporate custodian, in at least some circumstances, to assert a personal act-of-production privilege in response to a subpoena for corporate documents. In the remaining circuits, the issue has never arisen because the courts have not departed from the traditional rule that the custodian may be compelled personally to produce the records of the collective entity. See J.A. 24-25 (collecting cases).

custodian of records of the defunct corporation. And, if a subpoena were addressed instead to the (nonexistent) corporation and were disobeyed, threats of contempt could not induce compliance with the subpoena, for the corporation would have no assets against which to impose coercive fines and no officers to threaten with incarceration. If the collective entity rule were replaced with a rule that required the government to address its subpoenas for corporate documents to the entity itself rather than its custodian of records, it would surely become a standard ploy to disband small corporations used for shady dealings as a way of protecting the records of those corporations against the grand jury's legitimate exercise of its subpoena power.

A variation on the same theme is the argument that the government should subpoena corporate records from an individual but should find one who is not subject to potential incrimination. That, too, is not a practical answer. It is often the case that only the subjects of an investigation know the location of the corporate records most pertinent to the criminal investigation. In the case of small entities, every qualified custodian may be subject to potential criminal liability, or the person subject to potential liability may try to exclude his colleagues from any access to the records (see, *e.g.*, *Bellis*, 417 U.S. at 99). Petitioner argues that a corporate employee asserting his Fifth Amendment privilege should have no duty to assist an appointed corporate custodian in locating the corporate records that are the subject of the subpoena (Pet. Br. 47). If that rule is adopted, the threat of a contempt sanction against corporate employees for failing to comply with subpoenas to the corporation will be meaningless. In that setting, it is not difficult to imagine how often incriminating documents will lose their way between the corporation's files and the grand jury room.

Thus, the proposed substitutes for the collective entity rule are inadequate. In spite of petitioner's claim to the contrary, abolition of the collective entity rule, as petitioner proposes, would have a devastating impact on enforcement of the laws against white-collar crime. Petitioner has offered no reason to doubt the truth of this Court's observation in 1974 that "recognition of the individual's claim of privilege with respect to the financial records of the organization" would "largely frustrate legitimate governmental regulation of such organizations" (*Bellis*, 417 U.S. at 90).

2. The Rationale Supporting the Collective Entity Rule Remains Sound and Applies Fully to Cases in Which the Fifth Amendment Claim is Based on the Incriminatory Character of an Act of Production

Petitioner challenges the reasoning that has supported the collective entity rule through the years (see Pet. Br. 31-40), concluding that each justification provided for the rule either is wrong or is inconsistent with the Court's Fifth Amendment analysis in *Fisher* and *Doe*. We submit that the reasons this Court has given to support the collective entity rule remain sound, and that there is nothing in either *Fisher* or *Doe* that undercuts them.

a. The Court has set forth four related justifications for the collective entity rule. First, the Court has stated that a custodian of corporate documents is deemed to waive his Fifth Amendment privilege by accepting custody of the corporation's property. See *Curcio*, 354 U.S. at 124-125 ("By accepting custodianship of records [the custodian] 'has voluntarily assumed a duty which overrides his claim of privilege' * * * with respect to the production of the records themselves."); *Wilson*, 221 U.S. at 380.

Second, as we have touched on above, the Court has reasoned that the corporation, having no privilege of its own, should not be given a de facto privilege by recognizing a personal privilege in the custodian of its documents. See *Bellis*, 417 U.S. at 90; see also *Wilson*, 221 U.S. at 384-385 ("The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation.").

Third, the Court has noted that the collective entity rule is essential to law enforcement and has only a minimal impact on Fifth Amendment values. As the Court explained in *White*, 322 U.S. at 700,

> [t]he scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. * * * The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.

See also *Bellis*, 417 U.S. at 90-91; 8 J. Wigmore, *Evidence* § 2259b, at 360-361 (J. McNaughton rev. ed. 1961); Alito, *supra*, 48 U. Pitt. L. Rev. at 69-70; Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 705-706 (1951); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1283 (1979); cf. Note, *supra*, 54 Fordham L. Rev. at 950-951 & nn.118 & 120.

Fourth, and most important, the Court has pointed out that the individual who produces corporate documents on behalf of the corporation does not do so in his individual capacity, but rather as the agent of the corporation, so that the act of production, if incriminatory, constitutes incrimination of the individual by the corporation, rather than incrimination of the individual by his own words or deeds.[14] As this Court explained in *White*, 322 U.S. at 699,

> individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the

[14] See *Wilson*, 221 U.S. at 385 ("When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize."). *Essgee*, 262 U.S. 158 ("[A]n officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his personal capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them.").

papers might tend to incriminate them personally.

Since the decision in *White*, that rationale for the rule has been reiterated on several occasions. See *Curcio*, 354 U.S. at 123; *Bellis*, 417 U.S. at 90; *Fisher*, 425 U.S. at 430 n.9 (Brennan, J., concurring in the judgment).

Taken together, these justifications for the collective entity rule can be summarized as follows: A corporation called on to turn over documents must act through a human being. Necessarily, then, an individual who has undertaken to act for the corporation is cloaked with the corporate mantle when he performs the act of producing documents. The corporation may be compelled to produce documents notwithstanding any incrimination of the corporation or any individual. Therefore, when an individual acts as the agent of the corporation—as he does whenever he produces corporate documents—it is the corporation and not the individual who is turning over the documents, and there is no privilege available for either the individual or the corporation to claim.

b. Petitioner attempts to distinguish the cases announcing and reaffirming the collective entity rule by arguing that the collective entity rule never applied to the testimonial aspects of the act of producing corporate records. If petitioner means to suggest that the cases announcing the collective entity rule would have been decided differently if the records custodians had sought to rely on the incriminating content of their act of producing documents, rather than the incriminating contents of the documents themselves, petitioner is mistaken.

In the first place, this Court's opinions stating the collective entity rule have regularly expressed the rule as prohibiting the custodian of records from invoking

the Fifth Amendment as a basis for resisting a subpoena, not just as a restatement of the principle that the contents of the documents give rise to no Fifth Amendment claim.[15] To suggest that the Court would

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[15] See, *e.g.*, *Wheeler*, 226 U.S. at 490 ("nor does the privilege of individuals against self-incrimination in the production of their own books and papers prevent the compulsory production of the books of a corporation with which they happen to be or have been associated"); *White*, 322 U.S. at 699 ("the official records and documents of [an] organization that are held by [individuals] in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally"); *Oklahoma Press*, 327 U.S. at 208 ('the fair distillation [of prior cases], insofar as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers"); *Rogers*, 340 U.S. at 371-372 (footnotes omitted) ("petitioner had no privilege with respect to the books of the Party, whether it be a corporation or an unincorporated association"); *Curcio*, 354 U.S. at 122 ("Nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production."); *McPhaul*, 364 U.S. at 380 (repeating above-quoted language from *White*); *Bellis*, 417 U.S. at 100 ("It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be."); *Fisher*, 425 U.S. at 411-412 ("This Court has also time and again allowed subpoenas against the custodian of corporate documents * * * over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor."); see also *Wilson*, 221 U.S. at 384 (custodian "could not withhold the books to protect himself from the effect of their disclosures"); *Dreier*, 221 U.S. at 400 ("By virtue of the fact that they were the documents of the corporation in his custody, * * * [Dreier] was under obligation to produce them when called for by

have been impressed in those cases with an "act-of-production" argument that was not made is to ignore the unequivocal terms in which the Court repeatedly rejected the Fifth Amendment argument that *was* made. In all of those cases, the Court assumed that, if the records were personal rather than corporate records, the custodian would have a valid claim under the Fifth Amendment's proscription against compulsory self-incrimination; yet the Court in each case affirmed the right of the government to compel that incrimination in light of the corporate status of the records and the collective entity rule.[16]

In the second place, this Court reiterated the collective entity rule as accepted doctrine throughout the opinions in *Curcio* and *Fisher*, cases in which the Court carefully focused on the potential of testimonial incrimination through the compelled act of production.[17] Petitioner's assertion that "this Court

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proper process."); *Essgee*, 262 U.S. at 158 (custodian of corporate records "is not * * * protected against their production or against a writ requiring him as agent of the corporation to produce them").

[16] The decisions on which we rely are in no way undercut by the fact that we *now* know that the Fifth Amendment claim as to "contents" should not have succeeded for the independent reason that the contents were voluntarily prepared (see Pet. Br. 38). The fact that the Court has now adopted a rule that would have provided an alternative justification for the results in those cases is no warrant for ignoring the quite different rule—the collective entity rule—that the Court announced as the basis for its holdings.

[17] *Curcio*, 354 U.S. at 122 ("Nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production."); *ibid.* ("the books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian");

has never addressed the conflict between the Government's right to records, and the right of a custodian * * * not to incriminate himself through his act of

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id. at 123-124 ("A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers."); *id.* at 124-125 ("By accepting custodianship of records he 'has voluntarily assumed a duty which overrides his claim of privilege' * * * with respect to the production of the records themselves."); *id.* at 125 ("The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena."); *id.* at 126 n.4 (quoting *United States* v. *Austin-Bagley Corp.*, 31 F.2d 229, 233, 234 (2d Cir. 1929)) (" 'That the production of the books and documents could be compelled, even if they contained entries incriminating the accused, is now well-settled law. * * * By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own.' "); 354 U.S. at 128 ("The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons * * *."); *Fisher*, 425 U.S. at 408 ("despite *Boyd* [v. *United States*, 116 U.S. 616 (1886)], neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds"); *id.* at 411-412 ("This Court has also time and again allowed subpoenas against the custodians of corporate documents * * * over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor."); *id.* at 413 (in prior cases, "the custodian of [a collective entity's] books * * * was ordered to respond to a subpoena * * * even though doing so involved a 'representation that the documents produced are those demanded by the subpoena' "); *id.* at 413 n.14 ("In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him.").

producing them" (Pet. Br. 31) is thus entirely incorrect. The Court in *Curcio* and *Fisher* fully understood that the act of production can incriminate the custodian of records, and the Court made it clear that the custodian must produce the documents anyway.

The real question in this case is not whether the collective entity rule as framed before *Fisher* and *Doe* operated to bar an assertion of an act-of-production privilege: as we have shown, it plainly did. The real question in this case is whether *Fisher* and *Doe* undermined the prior cases announcing the collective entity rule. We submit that they did not.

Fisher involved the act-of-production privilege of an individual taxpayer, and *Doe* involved the act-of-production privilege of a sole proprietor, whom the Court treated as having the same rights as an individual. Neither case involved an attempt to compel the representative of a collective entity to produce that entity's records. Nonetheless, the Court in *Fisher* referred to the collective entity rule as accepted doctrine, and the Court said nothing in *Doe* to suggest any disapproval or questioning of the rule.[18] In light of this Court's simultaneous approval of both the act-of-production doctrine and the col-

[18] It is therefore difficult to understand why the District of Columbia Circuit recently "f[ou]nd it significant that in *Doe* the Supreme Court * * * did not *expressly* limit its statement of the 'act-of-production' doctrine to individuals or sole proprietors, nor did it *deny* that custodians of collective entities could invoke the privilege *on behalf of themselves*" (*In re Sealed Case*, 832 F.2d at 1278 (emphasis added in part)). There having been no issue about collective entities before the Court in *Doe*, there was no reason for the Court to make express in *Doe* what it had already made express in *Fisher* (as well as *Curcio*) about the interrelationship of the act-of-production doctrine and the collective entity rule.

lective entity rule in *Fisher*, petitioner's position must be that there is some logical inconsistency between the two that escaped the Court's notice at the time. We see no such inconsistency.

In *Fisher*, this Court rejected the argument that an individual may decline to produce his voluntarily prepared business records on the ground that the contents of those records might incriminate him. Because the disclosure of the contents of such records is not testimonial, the Court held, the privilege against compulsory self-incrimination provides no protection against such disclosure. When an individual is called on to produce such records, the Court noted, the only possible source for a claim of privilege is the testimonial aspect of the act of producing the documents. Thus, the *Fisher* Court held that, when a subpoena seeks the business records of an individual or a sole proprietorship, the Court will not inquire into the contents of the records, but will instead inquire whether the act of production has testimonial, incriminatory aspects (425 U.S. at 410; see also *Doe*, 465 U.S. at 612-613).

Fisher's rejection of the proposition that the contents of business records can ever be the subject of a valid Fifth Amendment claim was a watershed holding. But the Court's recognition of the act-of-production doctrine was not new. As petitioner concedes (Pet. Br. 28 n.10; see also *id.* at 13), that doctrine actually predates *Hale* v. *Henkel*, *supra*. See J. Wigmore, *Evidence* § 2264, at 3124 (1904).[19] It

[19] In light of petitioner's claim that the Court's focus on the act of production in deciding document subpoena cases somehow undercuts the collective entity rule, it is particularly noteworthy that the Wigmore treatise, which gave birth to the act-of-production theory in 1904, also supports the collective

was mentioned in passing in the *Wilson* case, 221 U.S. at 378, and it received explicit judicial acceptance in the 1920s. *People* v. *Defore*, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926) (Cardozo, J.); see also *Haywood* v. *United States*, 268 F. 795, 803 (7th Cir. 1920). In 1957, this Court recognized the doctrine in *Curcio*, 354 U.S. at 125. Justice Marshall discussed the act-of-production theory in his dissenting opinion in *Couch* v. *United States*, 409 U.S. 322, 346-347 (1973), just one Term before writing the opinion for the Court in *Bellis*, which once again reaffirmed the collective entity rule. See generally Alito, *supra*, 48 U. Pitt. L. Rev. at 65-66.

Fisher put an end to the argument that a claim of privilege could be tied to the contents of the records; it left only the act of production as the basis for the privilege. *Doe* refined the ruling in *Fisher* that the act of production was the only basis on which an individual or sole proprietor could ground his Fifth Amendment claim. Neither case in any way expanded the act-of-production doctrine as a basis for asserting the privilege. That doctrine attained prominence after *Fisher* and *Doe* not because it was given more vitality, but because it was the only ground for resistance that was left. See generally Note, *supra*, 54 Fordham L. Rev. at 946-949. The elimination of the principal ground on which corporate custodians for six decades had unsuccessfully sought to defeat subpoenas for corporate documents did not suddenly promote the subsidiary act-of-production doctrine into a convincing rebuttal to the collective entity rule.[20]

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entity rule. See 8 J. Wigmore, *Evidence* § 2259b (J. McNaughton rev. ed. 1961).

[20] Reliance on the act-of-production doctrine recognized in *Fisher* and *Doe* as a basis for overturning the collective entity rule would be particularly curious, because the reason a corporate custodian resists a subpoena for corporate documents seldom has much to do with the incriminating aspect of the act of production. Instead, it is safe to say that the vast majority of all disputes in which the act-of-production doctrine is invoked are really attempts to avoid having to produce documents because of their incriminatory content (see *Couch*, 409 U.S. at 348 (Marshall, J., dissenting); Alito, *supra*, 48 U. Pitt. L. Rev. at 46, 48). Petitioner virtually concedes as much (Pet. Br. 41 & n.17). To overturn the collective entity rule through the device of the act-of-production doctrine would thus in effect revitalize, and greatly expand, the incriminating nature of the contents of documents as a basis for resisting subpoenas—an odd result to attribute to two cases that purported to reject that ground for resisting subpoenas once and for all. In *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc), the court of appeals reached a contrary conclusion by reasoning that *Fisher* and *Doe* created new Fifth Amendment doctrine by "mak[ing] the significant factor, for the privilege against self-incrimination, * * * the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled" (768 F.2d at 528; accord *In re Sealed Case*, 832 F.2d at 1277). Petitioner endorses this reasoning explicitly (Pet. Br. 33) and similarly postulates that all pre-*Fisher* cases were decided "[b]efore [this Court's] adoption of a compelled testimony standard" (Pet. Br. 37). But it has *always* been necessary, in order to invoke the Fifth Amendment, to show that the arguably incriminating disclosure sought to be compelled is testimonial. It was fully recognized at the time of *Wilson* that the Fifth Amendment privilege applies only to testmonial communications (see, *e.g.*, *Holt* v. *United States*, 218 U.S. 245 (1910)), and the contents of documents were at that time regarded as testimonial communications. The Court nonetheless saw fit to make an exception to the privilege for the contents of corporate documents, even when compelled production would incriminate the subpoenaed corporate representative himself.

This Court has for years recognized the coexistence of the act-of-production doctrine and the collective entity rule, and there is not, as petitioner contends (Pet. Br. 31-40), any logical inconsistency between

the two doctrines. First, the act-of-production doctrine does not in any way undermine the agency theory on which the collective entity rule principally rests. If the individual producing corporate documents is not acting in his individual capacity, but only as an agent of the corporation, he cannot complain about being incriminated by the corporation's act of producing the documents any more than he can complain about being incriminated by the contents of the documents that the corporation discloses. Petitioner's attempt to refute this underlying rationale for the collective entity rule (Pet. Br. 37-39) rests in no part on *Fisher* and *Doe* but instead boils down to an assertion that this Court was simply wrong to employ this rationale in *Wilson* in 1911, *Essgee* in 1923, *White* in 1944, *Curcio* in 1957, and *Bellis* in 1974.

We disagree with petitioner's assertion that this Court has repeatedly erred by differentiating a corporate agent's production of documents from the production of documents by an individual acting in a nonrepresentative capacity. Unless *Hale* v. *Henkel* is to be overturned and corporations are to be given Fifth Amendment privileges, it must be the case that *some* natural person can be compelled to act as the corporation's agent in order to fulfill the corporation's duty to produce documents. And, as we have shown, allowing the corporation rather than the government to select that person will frustrate legitimate government efforts to obtain documents and will predictably result in the nondisclosure of documents to which the government has every right.

Petitioner apparently regards the "agency" rationale for the collective entity rule as a fiction that is both unjustified (Pet. Br. 38-39, 48) and without logical limit, as it could be used to compel even oral

testimony before the grand jury (*id.* at 39). The answer to the latter point is that this Court's decision in *Curcio* places a logical limit on the use of the "agency" rationale: it may not be used as a basis for compulsion of oral testimony before the grand jury except, perhaps, when that oral testimony does nothing more than identify or authenticate previously produced documents (354 U.S. at 125); but it may be used as a basis for compulsion of the production of documents (*id.* at 123).

Contrary to petitioner's claim (Pet. Br. 34-35), the *Curcio* case does not support his contention that there can be no logical distinction between the compulsion of incriminating oral testimony by a custodian of records, which is forbidden in some circumstances by *Curcio*, and the compulsion of tacitly communicative incriminating acts of production by a custodian of corporate records, which according to petitioner must also be forbidden. See also NACDL Br. 14. The argument that there is no such logical distinction is ironic, for two reasons. *First*, the whole point of *Curcio* is that there *is* a distinction between the oral testimony whose compulsion was attempted in that case and the tacit communications inherent in the act of producing documents. The government argued strenuously in *Curcio* that the collective entity rule recognized in *White* applied equally to compelled production of records and compelled oral testimony about "the whereabouts of books and records that have been subpoenaed but not produced" (354 U.S. at 123). The Court's response was to state emphatically that compelled production of records and the compelled oral testimony sought are not the same thing for purposes of the Fifth Amendment (*id.* at 123-124, 128). The very argument that petitioner now makes *against* the government is the argument that the Court rejected

when it was advanced *by* the government. *Second*, the Court in *Curcio* was careful to limit its holding to forbid only testimony about the whereabouts of unproduced records and to leave open the question whether, as had been held in *United States* v. *Austin-Bagley Corp.*, 31 F.2d 229 (2d Cir. 1929) (L. Hand, J.), "a corporate officer who has been required by subpoena to produce corporate documents may also be required, by oral testimony, to identify them" (354 U.S. at 125). Thus, contrary to petitioner's assertion (Pet. Br. 22), *Curcio* does not even stand for the proposition that compelled *oral testimony* by a corporate custodian identifying records is impermissible, much less the proposition that equivalent communications that are tacit in the act of producing records cannot be compelled.

Petitioner's challenges to the other justifications that have historically been cited in support of the collective entity rule are also unpersuasive. The implied-waiver theory is no less valid now than it has been in the past. Although petitioner suggests that a waiver of the Fifth Amendment privilege must be knowing, intelligent, and voluntary, the Court has never required such an express waiver before applying the collective entity rule in the past, and petitioner gives no reason to require it now. In this area of the law, as in others,[21] the necessity of government regulation

[21] See, *e.g.*, *New York* v. *Burger*, No. 86-80 (June 19, 1987) (junkyard owners may be subjected to searches that would violate the Fourth Amendment if they were engaged in other businesses); *Shapiro* v. *United States*, 335 U.S. 1 (1948) (entry into particular regulated industries subjects individuals and collective entities to requirements that they both keep and produce on demand "required records" whose compelled production might otherwise be inconsistent with the Fifth Amendment).

may mean that one's voluntary choice to do business in a particular way—without the need for any "knowing, voluntary, and intelligent" waiver—leads to one's having less constitutional protection from government oversight than one would have enjoyed in another business or by doing business in a different way.[22]

Likewise, the practical considerations that have been cited in justification of the collective entity rule are at least as compelling now as they have been in the past. The law enforcement needs for access to corporate records are as great now as ever, and, as we have demonstrated, recognizing an act-of-production privilege for corporate representatives would seriously impair that interest. At the same time, the self-incrimination concerns that must be balanced against those law enforcement interests are much less compelling now than they were before *Fisher* and *Doe*, now that it has been recognized that there is no Fifth Amendment interest in shielding the contents of documents, but only a Fifth Amendment interest in preventing the much more limited disclosures inherent in the act of production.[23]

[22] Petitioner and amicus also rely on cases in which this Court has refused to find a valid waiver of Fifth Amendment rights even though individuals had engaged in the conduct in question with knowledge that a statute purported to require them to waive their rights. Pet. Br. 36-37; NACDL Br. 15-19. But none of those cases involved the very limited testimonial communications that are tacit in an act of producing corporate records, and none of those cases involved an attempt by an entity having no Fifth Amendment right to evade its duty to respond to valid process. Moreover, any assertion that petitioner was not on notice that incorporating his business constituted an implied waiver of the right to protect business documents from disclosure ignores decades of settled precedent from this Court.

[23] Petitioner's analysis of the justifications for the collective entity rule is correct in one limited respect: as he argues

Because the collective entity rule is based on the fact that the corporate custodian is acting throughout in his representative rather than his individual capacity, a court may preclude the government from treating the custodian's conduct as his individual act for other purposes. Thus, because it is not the individual but the corporation that has turned over the documents, the government may not make evidentiary use of the fact that a particular individual within the corporation performed the physical act of production. That is not to say that the individual producing the documents may be given "constructive use immunity" for the act of production—far from it. The government has every right to use the *corporation's* act of production to incriminate the individual, and any inferences drawn from the fact that the *corporation* produced the documents—as opposed to inferences drawn from the fact that a particular individual produced the documents—are fully available for the government's use. Use immunity protects a person who has incriminated himself against evidentiary or derivative use of the immunized communication by which he did so. By contrast, a prohibition against the government's treating the corporation's act of production as the individual's act would derive from the

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(Pet. Br. 39-40), the "privacy rationale" that this Court once advanced for the collective entity rule (see *Bellis*, 417 U.S. at 91-92) cannot survive *Fisher* and *Doe*. But, as petitioner concedes (Pet. Br. 34 n.12), *Bellis* did not rest on the privacy rationale alone but "reaffirm[ed] all of the Court's earlier justifications underlying the government's 'right' to business records." It is those traditional underlying justifications, and not just the erstwhile privacy rationale of *Bellis*, that petitioner must refute in order to prevail. He has not done so.

fact that the individual, as individual, is deemed to have performed no such act.[24]

Thus, the act of production by a corporate representative, if properly treated as the act of the corporation, may have testimonial value at a trial of the representative. It would authenticate the records and establish their existence and possession by the corporation—evidence that could be used against the representative because it is the corporation's act and the unprivileged contents of the documents that incriminate him. The basis for the collective entity rule is not that the act of production is without testimonial value. In fact, the *Fisher* Court recognized the testimonial value of that act even while reaffirming the collective entity rule (425 U.S. at 411-412). The rule is instead based on the proposition that the testimony is the corporation's, not the representative's. Because the act of production is the corporation's, there is no reason it may not be used against the representative for whatever purpose the government chooses. The only thing the government may not do is to assert

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[24] We take the approach adopted by the Sixth and Eighth Circuits to be equivalent to the analysis that we suggest. The Sixth Circuit based its ruling on the fact that "[t]he custodian of corporate or partnership records acts only in a representative capacity, not as an individual, and production of the records is not a testimonial act of the custodian [but] * * * communicates nothing more than the fact that the one producing them is a representative of the corporation or partnership." *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148, cert. denied, 474 U.S. 1033 (1985); see also *In re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294, 297 (6th Cir. 1983), cert. dismissed, 465 U.S. 1085 (1984); *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, No. 85-1987 (Jan. 15, 1987).

that the act of production was the personal testimonial act of the representative.[25]

In sum, the collective entity rule rests on a solid foundation, and we submit that the Court should reaffirm its holding that a corporate custodian is acting on behalf of the corporation, and not as an individual, when he produces corporate records. The individual's privilege against compelled self-incrimination can be fully protected by forbidding the government to treat the act of production as something that it is not: an individual act. The individual's desire not to have the corporation incriminate him is not protected, because the Fifth Amendment provides no such protection.

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[25] Accordingly, although the Third Circuit reached the incorrect result in *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (1985) (en banc), the court may have been rightly disturbed by the government's suggestion that it could compel the witness in that case personally to produce the documents and then use his personal act of production against him, and by the government's refusal to accept delivery of the documents by the witness's attorney (768 F.2d at 526, 529 n.4). The proper result in *Brown* would have been for the court to compel production of the documents by Brown as the agent of the corporation, but to bar the government from making evidentiary use of the fact that it was Brown—as opposed to simply the corporation—that turned over the documents. Likewise, in *In re Grand Jury Subpoenas Duces Tecum (Saxon Industries)*, 722 F.2d 981 (2d Cir. 1983), the court should not have remanded for the district court to decide whether to quash the subpoena on the ground that the former corporate officer's possession of the records could be used as evidence that he absconded with them. Rather, the court should have refused to quash the subpoena but, if the issue subsequently arose, the court should have prevented the government from making use of the fact that it was the former president, rather than someone else associated with the corporation, who produced the documents.

B. Although this Court Should Not Reach Two Other Issues Discussed in Petitioner's Brief, Petitioner's Analysis of Those Issues Is Flawed

Petitioner's brief discusses two issues that were not reached by either the district court or the court of appeals. Petitioner endeavors to show that the "facts and circumstances" of this case (*Fisher*, 425 U.S. at 410) support his claim that compelled production of corporate records would incriminate him (Pet. Br. 40-48). Petitioner also argues that, once he establishes that claim, only statutory use immunity and not the appointment of someone else to produce the records will comport with the Fifth Amendment (*id.* at 46-47; see also NACDL Br. 21-30). We submit that neither issue is ripe for resolution by this Court.

Our primary position, of course, is that these issues are not relevant to this case because, as the court of appeals held, the collective entity rule requires petitioner to comply with the subpoena without any further inquiry. If the Court rejects that argument and holds that there are some circumstances in which a custodian of corporate records may invoke his personal Fifth Amendment rights in response to a subpoena for those documents, we submit that the record is not adequate to permit the Court to determine whether petitioner may invoke the privilege in this case.

According to *Doe*, the question whether "the act of producing records would involve testimonial self-incrimination" in a particular case rests on a "determination of factual issues" (465 U.S. at 613-614 (footnote omitted)). No such factual determination has yet been made in this case, because the government argued and both courts below agreed that any

such factual determination was irrelevant to the task at hand. If this Court disagrees, then in our view both petitioner and the government would be entitled to make a new evidentiary presentation to the district court and to have that court resolve the issue, in the first instance, based on any findings of fact it might make. Indeed, petitioner concedes, at least in part, that "a remand for [a] limited purpose might be appropriate" (Pet. Br. 46 n.21).

Only if petitioner succeeded in making a factual showing supporting a claim of act-of-production privilege would it become necessary to consider whether compelled production of the corporate records through some other person would be appropriate. Furthermore, resolution of that issue again might require factual findings. For example, despite the claimed status of Worldwide Purchasing and Worldwide Machinery as one-man operations, each corporation has two other officer-directors (petitioner's wife and mother) and one other employee (a secretary, also related to petitioner), and it might become necessary to determine whether there is any legal or factual obstacle to an attempt to require them to produce the corporate records.

We therefore suggest that this Court not resolve these issues. If the Court is not disposed to affirm the judgment of the court of appeals on the grounds we have argued above, it should leave the remaining issues to the lower courts on remand for resolution in the first instance. We limit our discussion of these issues accordingly. Because petitioner has addressed these issues, however, we briefly mention what we perceive to be the major flaws in petitioner's analysis.

1. *Petitioner's Claim that He Would Be Incriminated By the Act of Producing Corporate Documents Improperly Rests on the* Contents *of Those Documents*

As *Fisher* makes clear, there are two distinct ways in which the response to a document subpoena may communicate information to the government: the contents of voluntarily prepared records will communicate information (a fact that gives rise to no Fifth Amendment scrutiny), and the very act of production will sometimes communicate additional information. The sole object of Fifth Amendment protection is the additional information that is communicated by the act of production itself and not by the contents of the records.[26]

Petitioner initially appears to recognize this point. See Pet. Br. 41 (recognizing that privilege applies to "what the government will learn, not just from the contents of the records, but from Braswell's act of producing them"). But his effort to show that the act of production would incriminate him is not faithful to the distinction between the unprotected contents of the records and the protected communicative content of the act of production. In arguing that his tacit communication of the fact that the documents

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[26] It is erroneous to treat everything that the government knows *after* the act of production, but did not know *before* that act, as something that was communicated by the very act of production. Rather, the two distinct communications that have taken place—communications by the unprotected contents of the documents themselves and communications by the act of production—must be kept separate. A useful analytic aid to conducting this inquiry is to ask: What does the government know, given the act of production in response to a subpoena, that it would not have known if the documents had simply shown up, unsolicited, in the grand jury room? See Alito, *supra*, 48 U. Pitt. L. Rev. at 60-61.

exist would incriminate him, petitioner rests on what the contents of those documents would show. See Pet. Br. 42 ("[d]ocuments are called for which may reflect taxable financial transactions"); *id.* at 43 ("[t]he records sought may reflect that items expensed on the corporate returns were in fact of a personal non-deductible nature"); *id.* at 45 (relying extensively on contents).[27] In arguing that his tacit authentication of the documents would incriminate him, petitioner ignores the methods of authentication that are available to the government using the contents of the documents rather than the act of production. See, *e.g.*, Fed. R. Evid. 901(b)(3) and (4); Fed. R. Evid. 901(b) advisory committee note; 5 D. Louisell & C. Mueller, *Federal Evidence* § 515, at 78 (1981).[28]

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[27] Petitioner relies (Pet. Br. 42 & n.19) on Professor Mosteller's article in this respect. But that article, like petitioner's own analysis, is flawed by its failure to treat the tacit communications inherent in the act of production as something to be measured at the margin—rather than as a backdoor way to afford protection to the contents of the documents. That is also why Professor Mosteller reaches the conclusion, which is directly contrary to *Doe*, that act-of-production immunity protects the contents of documents. Compare Mosteller, *supra*, 73 Va. L. Rev. at 43, with *Doe*, 465 U.S. at 617 n.17.

[28] Petitioner also ignores the likelihood that his secretary could authenticate documents that she witnessed being written and documents that she received, typed, delivered, mailed, filed, read, or was otherwise familiar with (5 D. Louisell & C. Mueller, *supra*, § 507, at 27). She could also authenticate the corporations' business ledgers and journals, assuming that she made entries, saw them being made, or is familiar with the corporations' recordkeeping procedures (4 *id.* § 446, at 662-667 (1980); see also E. Cleary, *McCormick on Evidence*, § 219, at 688 (3d ed. 1984)). To be sure, the government cannot in this case—or in any other case—show, before it sees the documents, that it is an absolute certainty that every corporate document can be authenticated by one of these means. But if inability to make that showing is fatal to the government's ability to obtain the documents by subpoena, then no subpoena will ever again be enforceable without a grant of use immunity. We do not think *Fisher* and *Doe* were designed to bring about that result.

Petitioner's analysis of the "possession and control" element of the *Fisher* test perhaps comes closer to recognizing the distinction between the unprotected contents of business records and the protected act of production. Yet, if it was a "foregone conclusion" in *Fisher* that possession and control would be established even without the act of production (425 U.S. at 411), surely that is just as true here. Petitioner, after all, cannot deny that any records of Worldwide Purchasing and Worldwide Machinery are in his possession and control: to the contrary, he emphasizes his "total control over the contents of the records of the business" and his "'absolute, total, complete'" authority over the corporation (Pet. Br. 5). Petitioner, indeed, admits in so many words that he is "the custodian of * * * records" of Worldwide Purchasing and Worldwide Machinery (*id.* at 7).[29] This case is not at all like *Doe*, in which the court of appeals had postulated that "'the Government [was] unable to prove * * * that the appellee even is somehow connected to the business entities under investigation'" (465 U.S. at 613-614 n.12). Petitioner's connection to Worldwide Purchasing and Worldwide

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[29] Although petitioner maintains elsewhere in his brief (Pet. Br. 10, 45) that he has never admitted that the subpoenaed documents exist or that he has possession and control of them, that is simply not so in light of petitioner's statement of the case in this Court. Indeed, petitioner has given the district court an inventory of the records responsive to the subpoena and an assurance that he will turn them over if his legal contentions do not prevail. See Pet. App. 12a; 11/26/86 Tr. 4-5, 9-11.

Machinery is a matter of public knowledge and is expressly conceded by petitioner.

In sum, petitioner's analysis may tell us something about what the government will know following petitioner's response to the subpoena. But it tells us nothing about what that act of production—as opposed to the unprotected contents of business records and foregone conclusions—"adds * * * to the sum total of the Government's information" (*Fisher*, 425 U.S. at 411).

2. *Petitioner's Claim that a Court May Not Require That Someone Else Be Designated to Produce the Corporate Documents Is Incorrect*

Abolition of the collective entity rule, which is what petitioner seeks in this case, makes no sense unless it can be done consistently with the undisputed principle that corporations have no Fifth Amendment privilege and must produce their documents in response to a subpoena, no matter who will be incriminated. That is why every court of appeals that has departed from the traditional rule has nevertheless held that, if a request is directed to the corporation and not to its custodian of records, the corporation must produce the records, appointing an agent from outside the corporation if necessary to do so (see note 13, *supra*).

Petitioner (Pet. Br. 46-47) and amicus (NACDL Br. 21-30) criticize this result. They insist that, in cases where only the target of an investigation has access to or knowledge of some or all of the corporate records, the Fifth Amendment permits that person to maintain silence, even in response to the simple question—asked by the corporation's own selected agent—"Where are the corporate records, so that I

may examine them and try to determine for myself which ones are responsive to the subpoena?"

For 80 years, this Court has consistently maintained that every corporation, regardless of size, must turn over its documents in response to valid demands. Without a single exception that we know of, the lower courts still adhere to that rule. Petitioner purports to accept that rule. See Pet. Br. 34 ("[a] custodian claiming the privilege is not denying the Government's right to the records"). Yet, if petitioner prevails on this last argument, that will cease to be the law: there will be cases in which the government's only choices are granting use immunity to the target of the investigation or forgoing all access to a corporation's documents. The Constitution has never been held to require that result. It should not be so construed today.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1988

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RANDY BRASWELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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37pp

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No. 87-3

IN THE
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RANDY BRASWELL,
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UNITED STATES OF AMERICA,
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FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 4,000 lawyers, including representatives of every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of

---

[1] Amicus Curiae have obtained the written consent of the parties to file this brief, as indicated by the consent letters previously filed with this Court.

individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's fifth amendment rights. NACDL is very concerned that rejection of petitioner's position would undermine or dilute this constitutional guarantee.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the court.

SUMMARY OF ARGUMENT

Amicus believe that persons holding records for collecti· entities, such as corporations, partnerships, unions and

other organizations, retain their personal fifth amendment rights regardless of their role as records custodian for the entity, and should be entitled to assert this personal right when called upon to testify tacitly against themselves by performing the act of producing the records. Amicus believe that in the small number of cases in which the custodian's act of producing the organization's records will personally incriminate the custodian, the custodian can only be required to perform the act of production under a grant of stautory use immunity. Amicus believe that the government has no legitimate right to use the tacit, incriminating testimony obtained when a custodian furnishes the records against the custodian personally. The government's legitimate right to access to the records is fully protected in this situation when the custodian

produces the records under a grant of immunity, and the custodian gains no protection beyond that mandated by the fifth amendment.

ARGUMENT

I.

THE GOVERNMENT IS NOT ENTITLED TO USE THE TACIT, INCRIMINATING, TESTIMONIAL CONTENT OF A RECORD CUSTODIAN'S ACT OF PRODUCING RECORDS AGAINST THE CUSTODIAN PERSONALLY

The issue presented by this case is simple; may the Government compel tacit admissions from the custodian of a collective entity's records, and then use that tacit testimony against the custodian personally, simply because the entity itself has no fifth amendment rights.

The scenario that presents this issue recurs on close to a daily basis; a businessman who has control over corporate documents, or the documents of a

partnership, union or other collective entity, receives a grand jury subpoena that requests the production of certain records by the custodian. The subpoena requests such items as all bank records, or all correspondence relating to a particular transaction. The custodian tells his attorney that there are some documents that on their face do not appear to be required by the subpoena, but which in fact are related to the request, such as invoices that he knows relate to a given contract but that do not contain any reference to the contract. Should the custodian produce the documents, he will in essence have testified to their relevance to the transaction in question.

The businessman informs his attorney that no other person in the organization would be capable of compiling all of the relevant documents without his

help. He further knows that he is the target of the investigation, and that his tacit testimony will serve as a link in the chain of evidence against him. The attorney must now advise the client on a fundamental issue; whether the client may refuse to incriminate himself by performing the act of producing the records and insist that the Government provide statutory immunity against use of the act of production.

The issue, of course, arises only when the Government seeks to retain its ability to use a record custodian's act of producing records to incriminate the custodian personally, and when the organization has no other person with sufficient knowledge available to produce the documents. Should the organization have an agent capable of producing the documents without incriminating himself,

then the proper course is for the organization to use that person to comply with the subpoena. Should the government disclaim any interest in using the act of production against the custodian, then there is no reason for the government to refuse to provide the proper assurance that it will not so use the tacit testimony. As this Court made clear in United States v. Doe, 465 U.S. 605 (1984), statutory use immunity is the only proper means of overcoming a legitimate fifth amendment challenge, and a promise by the government not to use compelled testimony without statutory immunity is simply insufficient to overcome a valid assertion of the fifth amendment privilege. 465 U.S. at 609-10. The issue in this case, then, is of importance because the government seeks the right to force records custodians tacitly to incriminate

JOINT APPENDIX

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-3

In The

Supreme Court of the United States

October Term, 1987

RANDY BRASWELL,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 26, 1987
CERTIORARI GRANTED OCTOBER 5, 1987

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RELEVANT DOCKET ENTRIES

See order filed 10-9-87

IN RE: MISC. NO. 86-198
GRAND JURY SUBPOENA:
RANDY BRASWELL

(WORLD WIDE MACHINERY SALES, INC.)

(WORLD WIDE PURCHASING, INC.)

10-15-86	Motion to Quash Subpoena for Production of Documents, with Exhibit "A" and copy of Memorandum in support thereof attached, filed under seal.
10-15-86	Motion to Stay with Order attached, filed under seal.
10-15-86	ORDER: that the subpoena to produce documents presently returnable on 10-16-86 at 9:00 A.M., be continued until 11-18-86. (WHB) filed under seal.
11-12-86	ORDER: that the Motion to Quash is hereby denied; that Movant appear before the Grand Jury on 11-19-86 at 2:00 P.M., and produce the records listed in the aforementioned subpoena (WHB) filed under seal.
11-12-86	DEPUTY CLERK SHEET on Motion to Quash Subpoena held in Jackson, MS, before Judge Barbour on 11-12-86; Motion denied, filed under seal.
11-12-86	Exhibits G-1 and G-2 to Motion to Quash Subpoena, filed under seal.
11-18-86	Motion of U. S. Attorney to Hold Grand Jury witness in Contempt for failing to Obey Court Order, with c/s and Exhibits A & B attached, filed under seal.
11-24-86	JUDGMENT AND COMMITMENT: adjudged that Randy Braswell is in direct con-

tempt of this Court for failure to obey the Order of this Court dated 11-12-86; ordered that he be committed to the custody of the U. S. Marshal for the So. Dist. until such time as he shall obey said Order (WHB) filed under seal.

11-24-86 STAY OF COMMITMENT: that portion of the Judgment and Commitment Order of this Court dated 11-24-86 relating to the commitment of Movant is hereby stayed pending his appeal to the Fifth Circuit Court of Appeals, *provided* Mr. Braswell through his atty. submits forthwith to this Court *in camera* the records, etc. set out in Subpoena of 9-4-86; Mr. Braswell will be required to turn over to the Grand Jury in the event judgment of this Court is affirmed on appeal (WHB) filed under seal.

11-24-86 DEPUTY CLERK SHEET on Motion to Cite for Contempt held in Jackson, MS, before Judge Barbour on 11-24-86, Motion GRANTED, filed under seal.

11-24-86 Exhibit G-1 to Motion to Cite for Contempt, filed under seal.

12-01-86 NOTICE OF APPEAL of Order entered 11-24-86 ordering him incarcerated, which incarceration was stayed pending appeal, with Court Reporter's acknowledgment, filed under seal. (Est. completion date for transcript is 12/31/86.)

12-02-86 Certified copy of docket sheet and original record *sealed* and forwarded to Fifth Circuit.

12-03-86 Transcript of hearing on Motion to Quash before Judge Barbour in Jackson, MS on November 12, 1986, filed. *Separate Volume*

12-08-86 Original sealed record returned by Mr. Bauer with request for additional information.

12-10-86 Certified copy of docket sheet, certified copy of Notice of Appeal and cover letter setting out attys, and information requested was forwarded to Fifth Circuit, along with certified copy of order sealing this proceeding.

12-10-86 ORDER: this matter concerning grand jury proceedings is *sealed* until further order of the Court and the Clerk is instructed to forward such to the Court of Appeals for its review of the issue raised herein (WHB) filed 12-10-86, docketed 12-10-86.

12-12-86 Numbered and indexed original record and 1 Vol. of transcript forwarded to 5th Cir. today at the direction of George Bauer by telephone conversation today.

in Jax, MS, filed

1-09-87 Transcript of hearing on contempt motion, before Judge Barbour, 11-26-86.

4-01-87 Certified copy of Mandate of Fifth Circuit issued March 31, 1987: It is now ordered and adjudged by this Court that the judgment of the District Court in this cause is AFFIRMED; that appellant pay to appellee the costs on appeal, to be taxed by the Clerk of this Court (Rubin, Randall & Higginbotham).

4-01-87 Opinion of Fifth Circuit, certified copy dated March 31, 1987, Judgment of District Court is AFFIRMED, filed.

4-01-87 Received from Fifth Circuit 2 vols. of record.

4-01-87	Out card placed in MISC. ORDERS FILE. All original papers *sealed* and placed in Grand Jury File No. 2.
6-11-87	Certified copy of order of Fifth Cir.: The motion of appellant for recall of the mandate is GRANTED; provided, however, that the mandate shall issue on June 19, 1987. The application for further stay of the mandate pending application for writ of certiorari is DENIED. Filed. Letter dated 6-8-87 from 5th Cir. requested that the previously issued mandate dated March 31, 1987 be returned to their office. Certified copy was removed from file and returned to them.
6-15-87	Certified copy of order of Supreme Court of U.S.: Stay is continued pending timely filing of petition for a writ of certiorari and Court's action to said petition. If denied, this order is to terminate automatically; if granted, this order shall continue in effect pending the sending down of the judgment of this Court (Justice White) filed. Copy handed Judge Barbour's office.
6-22-87	Received from 5th Cir. certified copy of judgment of that court to be issued as and for the mandate: "that the judgment of the District Court in this cause is affirmed"; "that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court." Filed. Copies mailed by 5th Cir.
10-09-87	Petitioner Randy Braswell's Unopposed Motion to Unseal the Record of this proceeding, with proposed order and C/S attached, filed.

10-09-87	ORDER: it is ordered that the record of this matter *is hereby unsealed* (*WHB*) filed. Copies mailed attys' of record. (At the direction of Judge Barbour, this Order was removed from the motion and filed separately.)

THE GRAND JURY SUBPOENA DUCES TECUM SERVED UPON PETITIONER, RANDY BRASWELL ON AUGUST 20, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

TO:

Randy Braswell, President
Worldwide Machinery Sales, Inc.
Worldwide Purchasing, Inc.

SUBPOENA FOR:

[ ] PERSON [X] DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
U.S. Post Office and Courthouse Jackson, MS	Grand Jury 5th Floor

DATE AND TIME
Sep. 15, 1986
9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

All books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985, to include, but not limited to, the following:

1. Receipts and disbursements journals.
2. General ledger and subsidiaries.
3. Accounts receivable/accounts payable ledgers, cards, and all customer data.

4. Bank records of savings and checking accounts, including statements, checks, and deposit tickets.
5. Contracts, invoices—sales and purchase, conveyances, and correspondence.
6. Minutes and stock books or ledgers.
7. Loan disclosure statements and agreements.
8. Liability ledgers.
9. Retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941.

x *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
/s/ Clarence A. Pierce	Aug. 20, 1986

(BY) DEPUTY CLERK

This subpoena is issued on application
of the United States of America

NAME, ADDRESS AND PHONE NUMBER OF
ASSISTANT U.S. ATTORNEY
Frank J. Violanti, Asst. U.S. Atty
P. O. Box 1417, Biloxi, MS 39533
601-432-5521

ADDITIONAL INFORMATION

NOTE: In the alternative, you are commanded to deliver the subpoenaed documents to the agent serving this subpoena, in which event you need not appear or bring the subpoenaed documents at the location, date and time specified above.

RANDY BRASWELL'S MOTION TO QUASH SUBPOENA FOR THE PRODUCTION OF DOCUMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:	)	
GRAND JURY SUBPOENA:	)	
RANDY BRASWELL	)	
	)	MISC. NO.:
(WORLD WIDE MACHINERY	)	86-198
SALES, INC.) (WORLD WIDE	)	
PURCHASING, INC.)	)	

MOTION TO QUASH SUBPOENA
FOR PRODUCTION OF DOCUMENTS

(Filed October 15, 1986)

NOW INTO COURT, through undersigned counsel, comes Randy Braswell, who for the reasons set forth in the attached memorandum of law requests this Court to issue an order QUASHING the grand jury subpoena for documents, a copy of which is attached hereto, as Exhibit A, which was issued to him as President of World Wide Machinery Sales, Inc., and World Wide Purchasing, Inc., and which is returnable (by oral agreement between counsel) on October 15, 1986, at 9:00 a.m. in the grand jury room fifth floor, of the U.S. Courthouse in Jackson, Mississippi, Undersigned counsel for Mr. Braswell has been advised by counsel for the Government that the Grand Jury is investigating purported violations of the Internal Revenue Code by Randy Braswell, namely, 26 USC 7201 and 7206. Mr. Braswell is thus the target of the Grand Jury investigation, Mr. Braswell asserts that the very act

of production of said documents would be an infringement of his Fifth Amendment Constitutional Privilege against self-incrimination and therefore, under federal law this subpoena for documents must be quashed.

WHEREFORE, Randy Braswell moves for an order of this Court quashing the grand jury subpoena issued to him and presently returnable on October 15, 1986, as set forth herein.

Respectfully submitted,

/s/ M. S. Fawer
MICHAEL S. FAWER

/s/ M. O. Riccio
MARIE O. RICCIO
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700 CAMP STREET
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(504) 528-9500

ORAL RULING AND REASONS OF THE DISTRICT COURT ON RANDY BRASWELL'S MOTION TO QUASH, AS GIVEN ON NOVEMBER 12, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
GRAND JURY SUBPOENA:
RANDY BRASWELL
(WORLDWIDE MACHINERY SALES, INC.)
(WORLDWIDE PURCHASING, INC.)

MISC. NO.: 86-198

BEFORE: The Honorable William H. Barbour, Jr., United States District Judge

DATE: November 12, 1986

PLACE: Jackson, Mississippi

APPEARANCES:

For Randy Braswell:

Michael Fawer
Herbert V. Larson

For the Government:

Frank Violanti
Nick Phillips

THE COURT: All right. The Court finds as a matter of fact that a grand jury has issued a subpoena to Randy Braswell in his capacity as president of two corporations, Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc. That subpoena requests the production of books and records relating to those two corporations for those four particular years. Worldwide Purchasing, Inc., is a corporation, the stock of which is owned entirely by

Mr. Braswell. Worldwide Machinery Sales, Inc., is a corporation, the stock of which at one time was wholly owned by Mr. Braswell but was transferred to Worldwide Purchasing, Inc., upon the organization of Worldwide Purchasing, Inc. Both corporations are viable corporations, apparently maintaining a current status with the State of Mississippi and apparently keeping current corporate books and records, including financial records and minutes and also filing corporate income tax returns.

Mr. Braswell prior to the incorporation of Worldwide Machinery Sales, Inc., in 1980 did business in the fields of trading in used heavy equipment and trading in real estate and trading in oil and gas properties individually in his own name; that all his assets, at least the overwhelming majority of his assets were transferred into Worldwide Machinery Sales, Inc., upon its incorporation, and he has thereafter done business in the corporate name; that business was later done in the corporate name of Worldwide Purchasing, Inc., rather than Worldwide Machinery Sales, Inc., when Worldwide Purchasing was organized. The extent to which Mr. Braswell has done business through these corporations is as near to total as the Court could imagine. He has taken title to all of his assets in the name of one or other of the corporations. He has even gone so far as to write his checks for personal expenditures, household expenditures, utilities, clothes, and other personal items on corporate checks, and his wife has testified that she uses credit cards issued in the name of one of the corporations for personal items such as clothes, jewelry, travel and the like.

The movant presented several witnesses, including his attorney, his banker, insurance agent, and a business part-

ner who testified that he did business in the name of the corporation, but every one of them understood that they were dealing personally with Randy Braswell. The Court notes, however, that every one of them mentioned that business was placed in the name of one of the corporations rather than Randy Braswell individually, and that in regard to loans made by the banker, that Mr. Braswell had to personally guarantee all loans, which is not unusual in the case of a small, closely held corporation.

Mr. Braswell in this capacity as president of the corporations has moved to suppress the subpoena under the act of production doctrine, claiming the Fifth Amendment privilege against self incrimination. He argues that the Court should consider in the case of closely held corporations as to whether they are truly organizations or collective entities under United States v. Doe, or whether the Court should look at closely held corporations and decide under Bellis v. United States as to whether they should be considered as not being organizations but in fact being the alter ego or true identity of the person who owns or controls them in the nature of sole proprietorships.

There is a conflict among the circuits in regard to this issue. The Second Circuit in the case of In Re Two Subpoena Duces Tecum, 769 F.2d 52, 1985, has taken the position that bright-line test is the appropriate test so that the records of no corporation are entitled to this Fifth Amendment privilege. The Third Circuit has held otherwise. Other circuits have basically followed the reasoning of the Second Circuit, although a number of the cases are less than definitive.

This court, of course, is required to follow the precedent of the Fifth Circuit. The Fifth Circuit has considered this issue, at least indirectly, in two cases. One, In Re Grand Jury Subpoena, (Lincoln), 767 F.2d 1130, 1985, and in United States v. Huckaby, 776 F.2d 564, 1985. Movant argues that In Re Lincoln is distinguishable from the case here and certain language in it allows a factual approach as to whether a corporation can be a collective entity held in a representative capacity as opposed to a sole proprietorship. This Court does not read In Re Lincoln in that manner, and reads In Re Lincoln to hold directly that a corporation is not entitled under United States v. Doe to enjoy the Fifth Amendment privilege. The Fifth Circuit in United States v. Huckaby in footnote 7 does appear to reopen this question, if in fact it was directly decided in In Re Lincoln.

The Court notes in regard to Huckaby that the language addressing this question is contained in a footnote and is dicta. The Court also notes that the panel in Huckaby was made up of judges who were not on the panel in the case of In Re Lincoln. The Court further notes that this issue was addressed in In Re Grand Jury Subpoena, 85-W-71-5, 784 F.2d 857, Eighth Circuit, 1986. In that case the Eighth Circuit followed the reasoning of the Second Circuit and held that a closely held corporation is not entitled to the privilege. The United States Supreme Court granted writ of certiorari in this case. Obviously the issue is an important one as it has been addressed differently in different circuits, and since the United States Supreme Court has granted certiorari.

This Court will not try to set forth in detail an opinion substantiating the decision that it reaches, but merely

holds that the reasoning of the Second Circuit appears to be the best approach to this issue, that it appears to this Court that that is the reasoning accepted by the Fifth Circuit in In Re Lincoln, and that that is the reasoning which this Court will follow in this case. Accordingly, the Court will deny the motion to suppress the subpoena.

WRITTEN ORDER OF THE DISTRICT COURT DATED NOVEMBER 12, 1986 DENYING RANDY BRASWELL'S MOTION TO QUASH

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: MISC. NO.: 86-198
GRAND JURY SUBPOENA:
RANDY BRASWELL
(WORLDWIDE MACHINERY SALES, INC.)
(WORLDWIDE PURCHASING, INC.)
FILED
NOV 12 1986

ORDER

This cause came before the Court on the motion of Randy Braswell as President of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., to quash a Federal Grand Jury Subpoena served upon him to produce all books and records of both corporations for the years 1982 through 1985. The Court, having considered the motion, together with memoranda of law submitted in support of the motion, as well as in opposition thereto, and having heard testimony in regard to the motion on November 12, 1986, and the Court otherwise being fully advised in the premises and for the reasons stated in the elaborate findings of fact and conclusions of law dictated by the Court into the record this date, the Court orders as follows:

1. That the motion to quash be denied and the same is hereby denied, and

2. That the movant appear before the Federal Grand Jury on Wednesday, November 19, 1986, at 2:00 P.M.,

and produce the records listed in the aforementioned Grand Jury Subpoena.

SO ORDERED this 12th day of November, 1986.

/s/ William H. Barbour, Jr.

UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY
Clarence A. Pierce, CLERK
By: /s/ L. McCormack
Deputy Clerk

JUDGMENT AND COMMITMENT ORDER OF THE DISTRICT COURT DATED NOVEMBER 24, 1986 HOLDING PETITIONER RANDY BRASWELL IN CONTEMPT OF COURT, AND COMMITTING HIM TO CUSTODY OF THE UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
GRAND JURY SUBPOENA — MISC NO. 86-198
RANDY BRASWELL — FILED UNDER SEAL
(WORLD WIDE MACHINERY SALES, INC.)
(WORLD WIDE PURCHASING, INC.)
FILED
NOV 24 1986

JUDGMENT AND COMMITMENT

On Motion of the United States Attorney for the Southern District of Mississippi, for an Order by the Court to enforce its Order of November 12, 1986, heretofore entered in the above entitled matter, the witness Randy Braswell, appearing before the Court in person and with counsel, and said witness having admitted that he had refused and would continue to refuse to furnish the records, documents and papers, described more particularly in this Court's Order, before and to the Grand Jury, the Court having heard argument of counsel and certified transcript of Mr. Braswell's testimony before the Grand Jury on November 18, 1986:

IT IS ADJUDGED that Randy Braswell is in direct and continuing contempt of this Court for his failure to

obey the Order of this Court, dated November 12, 1986, heretofore entered herein.

IT IS, THEREFORE, ORDERED that Randy Braswell be and hereby is committed to the custody of the United States Marshal for the Southern District of Mississippi until such time as he shall obey said Order.

SO ORDERED this 24th day of November, 1986.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY I HEREBY CERTIFY
Clarence A. Pierce, CLERK
By: /s/ L. McCormack
Deputy Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ENTERED ON MARCH 31, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4922

Summary Calendar

IN RE GRAND JURY
PROCEEDINGS: JOHN DOE

Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

(March 31, 1987)

Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges. PER CURIAM:

Randy Braswell, president and sole shareholder of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., appeals his contempt citation for refusing to produce the books and records of these corporations pursuant to a federal grand jury subpoena. Braswell contends that his personal privilege against self-incrimination justifies his refusal to produce the corporate documents because his closely-held corporations are not collective entities within the meaning of *Bellis v. United States*, 417 U.S. 85 (1974). In the alternative, he argues that some of the corporate documents are "private writings" and that, at

the very least, the fifth amendment protects these writings. The district court stayed Braswell's commitment pending this expedited appeal. *See* 28 U.S.C. § 1826(b). We affirm.

I

From 1965 to 1980, Braswell conducted his business, which includes the sale and purchase of equipment, oil and gas interests, and land and timber, as a sole proprietorship. Indeed, Braswell conducted all of his affairs, both personal and business, through the proprietorship.

In 1980, Braswell incorporated Worldwide Machinery, Inc., a Mississippi corporation, and retained ownership of 100% of its stock. Braswell then began conducting his business through Worldwide Machinery. In 1981, Braswell, concerned that the name "Worldwide Machinery" did not reflect his other pursuits, incorporated Worldwide Purchasing, Inc., also a Mississippi corporation. Braswell funded Worldwide Purchasing with the stock he held in Worldwide Machinery, and retained ownership of 100% of the stock of Worldwide Purchasing. Both corporations are active corporations, maintaining a current status with the State of Mississippi, keeping current corporate books and records, including financial records and minutes, and filing corporate tax returns.

In compliance with Mississippi law that corporations have at least three directors, *see* Miss. Code Ann. § 79-3-69, Braswell, his wife, and his mother sit as directors of both corporations. According to Braswell, however, neither his wife nor his mother has any authority over the business affairs of the corporations, although they have assumed

the offices of Secretary-Treasurer and Vice-President, respectively.

II

A federal grand jury subpoenaed the books and records of Worldwide Purchasing and Worldwide Machinery on August 20, 1986.[1] The subpoenas did not request Braswell to testify. Indeed, he was not even required to appear before the grand jury if the subpoenaed documents were delivered to the agent serving the subpoena. After a hearing the district court denied Braswell's motion to quash the subpoena and ordered Braswell to produce the documents, noting:

> [T]he way I see the question is that under the facts, Mr. Braswell was obviously doing business through the corporate name but was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled as almost as could be conceived.

When Braswell appeared before the grand jury, he refused to produce the subpoenaed documents. Upon motion of the government, the district court found Braswell in contempt of court and ordered him committed to the cus-

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[1]The subpoena requested "all books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985, to include, but not limited to the following: (1) receipts and disbursements journals; (2) general ledger and subsidiaries; (3) accounts receivable/accounts payable ledgers, cards, and all customer data; (4) bank records of savings and checking accounts, including statements, checks, and deposit tickets; (5) contracts, invoices—sales and purchase, conveyances, and correspondence; (6) minutes and stock books and ledgers; (7) loan disclosure statements and agreements; (8) liability ledgers; (9) retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941."

tody of the United States Marshal until he complied with the court's order. The district court, however, stayed the commitment of Braswell pending this expedited appeal.

In ruling upon Braswell's motion to quash the subpoena, the district court considered only the asserted "act of production" privilege.[2] The district court did not rule on the assertion that the subpoenaed documents included otherwise privileged "private papers." Braswell argues that the district court erred when it refused to apply the doctrine of *United States v. Doe,* 104 S.Ct. 1237 (1984), which upheld the assertion of an act of production privilege by a sole proprietor, to the case of a closely-held corporation.

Braswell contends that the corporate structure of Worldwide Purchasing exists only for its appearance[3] and that their formation did nothing to change the manner in which he conducts his business. Despite the presence of the three-member boards of directors, he contends that he has maintained "absolute, total, complete" control over the corporations. Moreover, his personal expenses, and those of his wife, are paid out of the corporate checking accounts. Indeed, the credit cards used by Braswell and his wife for personal expenditures are in the names of the

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[2]Braswell's counsel agreed that the issue was not before the court at that time. Accordingly, we do not face the question of whether there is any privilege under the Fifth Amendment for private papers.

[3]Braswell claims that the business was not incorporated for tax purposes, for limitation of shareholder liability, or for the creation of pension or profit sharing plans.

corporations,[4] as are all of Braswell's personal assets, including his house. Finally Braswell stresses the corporations have never acquired a loan from Braswell's primary banker without Braswell's personal guarantee.

III

An individual enjoys no fifth amendment privilege from producing records of a collective entity. *Bellis v. United States,* 417 U.S. 85, 88 (1974); *Grant v. United States,* 227 U.S. 74, 80 (1913). In *Bellis,* the Court defined a collective entity as "an organization which is recognized as an independent entity apart from its individual members." 417 U.S. at 92. The Court reaffirmed this definition of "collective entity" in *Doe,* 104 S.Ct. at 1240 n.4. The law of Mississippi is clear that a corporation is a creature of law, with a legal identity separate and distinct from that of its owners. *United States v. State Tax Comm.,* 505 F.2d 633, 637 (5th Cir. 1974). And the Supreme Court noted in *Bellis* that corporations, no matter how small, are collective entities. 417 U.S. at 100. Accordingly, Braswell's contention that his "one-man" corporations are not collective entities must fail.

Thus, "no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Bellis,* 417 U.S. at 100. Organizational records, subject to the visitorial powers of the state and review by the organization's members, must be produced

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[4]Although Braswell asserts that only he has authority to act on behalf of the corporation, his wife apparently has the authority to write checks on the corporate account and to use the corporation's credit.

by the custodian, who, by accepting his corporate office, is deemed to have waived his privilege with respect to any testimonial incrimination inherent in the act of production. *See Unted States v. White*, 322 U.S. 694, 700 (1944). This circuit has previously held in *In re Grand Jury Proceedings (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985), that *Doe* did not reject the holding of *Bellis*, thereby denying a "collective entity" custodian's assertion of an act of production privilege. Consequently, Braswell, as custodian of corporate documents, has not act of production privilege under the fifth amendment regarding corporate documents.

We note that two later panel opinions of this circuit appear to raise the question whether *Doe* should apply to closely-held corporations. *See United States v. Huckaby*, 776 F.2d 564, 570 n.7 (5th Cir. 1985); *United States v. Coppola*, 788 F.2d 303, 309 (5th Cir. 1986). However, each case raises the issue in *dicta* only, and neither suggests that *Lincoln* is not the law of this circuit.

We also note that the other circuits have split over this issue. The Second, Third, and Fourth Circuits have read *Bellis* narrowly to settle only the question whether a custodian has a fifth amendment privilege in the contents of "collective entity" documents. These circuits thus allow the custodian of collective entity documents an act of production privilege. *See United States v. Antonio Sancetta, M.D., P.C.*, 788 F.2d 67, 74 (2d Cir. 1986); *United States v. Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc). The First, Sixth, Eighth, Ninth and Tenth Circuits, on the other hand, have refused to grant an act of production privilege to the custodian of collective entity records. *See In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir.), *cert. granted sub. nom.; See v. United States*, 107 S.Ct. 59 (1986); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.) (en banc), *cert. denied*, 106 S.Ct. 594 (1985); *United States v. Malis*, 737 F.2d 1511, 1512 (9th cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.), *cert. denied*, 105 S.Ct. 90 (1984); *see also In re Grand Jury Proceedings United States*, 626 F.2d 1051, 1058 (1st cir. 1980). We held in *Lincoln* that assertion of an act of production privilege by a corporate custodian is foreclosed by *Bellis*, and that opinion binds this panel.

IV

Braswell also argues that the contents of the books and records are protectible to the extent the books and records are "private writings." This issue was not presented to the district court. Thus, whether or not this asserted privilege exists is not properly before us.

V

The judgment of the district court is AFFIRMED.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-3

In The
Supreme Court of the United States
October Term, 1987

RANDY BRASWELL,

Petitioner.

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER RANDY BRASWELL

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QUESTION PRESENTED FOR REVIEW

Whether the sole shareholder of a corporation may resist a grand jury subpoena for the records of that corporation when the mere act of producing such records would have testimonial aspects that might incriminate him personally.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(1) Petitioner, Randy Braswell

(2) Respondent, The United States of America

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, (#86-4922) whose opinion is to be reviewed herein, was rendered on March 31, 1987. This opinion is reported at 814 F.2d 190, reh'g den. 818 F.2d 865 (1987), (J.A. at pp. 19-25).[1] The judgment and reasons given orally by the United States District Court are unreported, and are reproduced at J.A., pp. 17-18 and J.A., pp. 10-14, respectively.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit, which affirmed the judgment of the district court, was rendered on March 31, 1987. Petitioner Randy Braswell timely moved for a rehearing *en banc*, which petition was denied on April 30, 1987.

A petition for a writ of certiorari was filed on June 26, 1987, or within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court. On Monday, October 5, 1987, the petition for a writ of certiorari was granted. This Court has jurisdiction over this proceeding pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

STATEMENT OF THE CASE

On or about August 20, 1986, petitioner Randy Braswell, as president of Worldwide Machinery Sales, Inc., and

[1] All references to the Joint Appendix will be designated as: (J.A., p. —).

Worldwide Purchasing, Inc., was served by a Special Agent of the Internal Revenue Service with a "Subpoena To Testify Before Grand Jury," which required his appearance before a federal grand jury sitting in the Jackson Division of the Southern District of Mississippi.[2] This second subpoena called for the production of *all* records of Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, and 1985. (J.A., pp. 6-7). Although the subpoena on its face called for the personal appearance of Randy Braswell, it contained the following "Note":

> In the alternative, you are commanded to deliver the subpoenaed documents to the agent serving this subpoena, in which event you need not appear or bring the subpoenaed documents at the location, date and time specified above.

Pursuant to mutual agreement of counsel for the parties, the return date on the subpoena was continued from September 15, 1986 to October 15, 1986. On October 14, 1986, petitioner Braswell filed a "Motion To Quash Subpoena for Production of Documents," a memorandum in support of that motion, and a "Motion to Stay." In his motion to quash, petitioner asserted a Fifth Amendment privilege not to produce the records called for by the subpoena, because the mere act of producing the documents sought would have testimonial aspects that might incriminate him (J.A., pp. 8-9).

The matter was allotted to the Honorable William H. Barbour, Jr., United States District Judge, who set a hearing date, and directed the Government to brief the issues raised by Braswell. On October 23, 1986, the Government filed the "Government's Memorandum of Law in Support of Its Opposition to Braswell's Motion to Quash Grand Jury Subpoena." Thereafter, on November 6, 1986, petitioner filed "Randy Braswell's Motion for Leave to Personally Intervene in These Proceedings, and to Quash all Portions of the Subpoena Duces Tecum Calling for the Production of Private Writings." A memorandum in support of this motion was also filed, which memorandum included a reply to the Government's opposition.

A hearing on Petitioner's motion to quash was held on November 12, 1986, before Judge Barbour, at which the facts recited below were established.[3]

Petitioner Randy Braswell, a resident of Magnolia, Mississippi, first went into "business for himself" in about 1965. From that date until 1980, Braswell, whose business ventures included the sales and purchases of equipment, oil and gas interests, and land and timber, conducted all of his affairs as an unincorporated sole proprietor. All of his personal financial affairs were also conducted through this "sole proprietorship," i.e., there was no distinction drawn between money or property belonging to Randy Braswell, sole proprietor, and Randy Braswell, private individual (H.T., pp. 43-58).

In 1980, Braswell formed Worldwide Machinery Sales, Inc., a Mississippi corporation. In 1981, Braswell formed a second company, Worldwide Purchasing, Inc., which is

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[2] This subpoena was not the beginning of the Government's investigation of Braswell. In June of 1985, Braswell's bank was served with a grand jury subpoena duces tecum for records of Braswell and his corporation. See p. 15 of the transcript of the November 12, 1986 hearing before District Judge Barbour on Braswell's Motion to Quash, which transcript is hereinafter designated as: (H.T., p. —).

[3] Randy Braswell did not testify at this hearing. The evidence was adduced from Thomas Brock, Braswell's corporate attorney, Jackie Braswell, his wife, Ray Price, Braswell's primary banker, and Eldred Henderson, William Bilbo and Jimmy Smith, all businessmen who have dealt with Braswell and his corporations.

also a Mississippi corporation. Braswell owns 100% of the stock of Worldwide Purchasing, Inc., which in turn owns 100% of the stock of Worldwide Machinery Sales, Inc. (H.T., p. 22).

According to the testimony of Thomas W. Brock, the Mississippi attorney who performed the legal work creating the two corporations, the companies were brought into existence *solely* for the sake of appearances. In Brock's words:

> A. (By Mr. Brock) Well, when Worldwide Machinery was incorporated, subsequently Worldwide Purchasing, Randy had gotten to the point where it had been a hinderance to do business as an individual, as a matter of form, and some of the companies that he was doing business with, just—it hurt. It hurt you as far as business was concerned to go in and say I'm Randy Braswell from Magnolia, Mississippi. We felt it was advantage to us strictly as a matter of form to incorporate.
> Q. (By Mr. Fawer) Pick out the name Worldwide?
> A. (By Mr. Brock) Worldwide to make it sound, you know, big and like we are up and coming.

(H.T., pp. 23-24)

From Brock's perspective, that of an attorney, none of the "traditional" reasons for incorporating motivated Braswell—there were no tax reasons, no pension or profit sharing plans, and no attempt to limit Braswell's personal liability for "corporate" debts. In fact, all of Braswell's "personal" assets, including his house, are in the name of the corporation. (The corporation referred to is Worldwide Purchasing, Inc. Worldwide Machinery Sales, Inc., is not used to conduct business) (H.T., p. 29).

This hearing also demonstrated that the formation of these two corporations changed nothing about the way Randy Braswell's financial affairs were conducted. The

directors of these corporations (in addition to Randy Braswell) consist of his mother and his wife, neither of whom had or have any authority whatsoever over the business affairs of the corporation (H.T., pp. 25-28; pp. 45-46).

One other matter also remained unchanged after incorporation: the corporations, as Randy Braswell's face to the business community, did not and do not now have any identity apart from Randy Braswell, the individual, as was illustrated by the following evidence produced at the hearing:

(1) Randy Braswell owns, and has always owned 100% of the stock of the active corporation.
(2) The corporation has only one employee other than Randy Braswell, this being the secretary, who is Braswell's sister-in-law.
(3) Braswell's authority over the corporation is "absolute, total, complete."
(4) Braswell has no personal checking account, only the corporate one.
(5) Braswell's personal expenses, and those of his wife, are paid out of the corporate checking account.
(6) Randy Braswell is the only individual who has the authority to act on behalf of the corporation, and is the only person who has ever acted on behalf of the corporation.
(7) Braswell has total control over the contents of the records of the business.
(8) These records reflect all of Braswell's financial transactions, personal as well as business.
(9) The credit cards used by Braswell and his wife for personal expenditures are in the name of the corporation.
(10) No bank loans to the corporation were ever made by Ray Price, Jr., Braswell's primary banker, without Braswell's personal guarantee.

(11) Other individuals doing business with Worldwide Purchasing, Inc., view themselves as actually doing business with Randy Braswell.

(12) Braswell even acquired the nickname "Worldwide," an indication that others in the business community viewed him as being synonymous with the corporation. (H.T., pp. 22-71)

In short, Braswell conclusively established that he was the perfect paradigm of a one-man corporation conducting business as a sole proprietor, one who continually mixed his personal affairs with the business. As District Judge Barbour put it: "[t]he way I see the question is that under the facts, Mr. Braswell was obviously doing business through the corporate name but was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled as almost could be conceived" (H.T., p. 76).

In addressing the privilege asserted by petitioner Randy Braswell, Judge Barbour found that the question before him was whether "the holding of *United States v. Doe*, [should] be applied to [Braswell's] records even though they're corporate in form because as a practical matter they are sole proprietorship form, sole proprietorship records, and that they should not be produced under any circumstances" (H.T., p. 77).

Judge Barbour found that earlier decisions of the Fifth Circuit had determined that *Bellis v. United States*, 417 U.S. 85 (1974), prohibited recognizing a Fifth Amendment privilege for records custodians of collective entities. Following those decisions which used *Bellis* to draw a "bright-line" for *any* corporation, Judge Barbour denied Braswell's motion.

Thereafter, on Tuesday, November 18, 1986, petitioner Braswell appeared before the grand jury and declined to

produce any of the records called for in the subpoena. Consequently, upon motion of the Government, petitioner was held in contempt of court by Judge Barbour on November 24, 1986, who ordered him committed to the custody of the Attorney General (J.A., pp. 17-18). This order of commitment was stayed pending Braswell's appeal to the United States Court of Appeals for the Fifth Circuit.

After the filing of briefs by petitioner and the United States, the Court of Appeals rendered its opinion on March 31, 1987, which affirmed the judgment of the district court, by employing reasoning identical to the district court's (J.A., pp. 19-25). Thereafter, on April 13, 1987, petitioner filed a petition for rehearing *en banc*, which was denied on April 30, 1987.

Subsequently, petitioner, pursuant to Rule 44 of the Rules of the Supreme Court, sought a stay of the mandate of the Court of Appeals from the Honorable Byron R. White, Associate Justice, which stay was granted by Justice White on June 10, 1987.

On June 26, 1987, Randy Braswell filed his petition for a writ of certiorari with this Honorable Court, which petition was granted on October 5, 1987.

SUMMARY OF ARGUMENT

Randy Braswell, sole stockholder of a one-man corporation and the custodian of its records, does not claim that the Fifth Amendment protects against the disclosure of the contents of such records, nor does he ask the Court to determine whether the contents of private writings are privileged under the Fifth Amendment. He only claims a right to assert his personal Fifth Amendment privilege in response to a grand jury subpoena duces tecum issued

to him for the records of his corporation in conjunction with a criminal tax investigation, because he would be incriminated by the act of producing those records.

The only basis advanced by the Government and the courts below for denying Braswell a Fifth Amendment privilege is his status as the records custodian of a corporation. The principle that a records custodian of a corporation has no Fifth Amendment privilege regarding the contents of the records of the corporation was first articulated by the Court in *Hale v. Henkel*, 201 U.S. 43 (1906), and was most recently discussed in *Fisher v. United States*, 425 U.S. 391 (1976). In the intervening years, the group of justifications used to deny the privilege came to be known as the collective entity doctrine. In application, the doctrine denies any corporate records custodian the right to assert his personal Fifth Amendment privilege with respect to the production of corporate records.

An examination of this doctrine, as developed in the Court's decisions in *Hale v. Henkel*, 201 U.S. 43 (1906), *Wilson v. United States*, 221 U.S. 361 (1911), *United States v. White*, 322 U.S. 694 (1943), *Curcio v. United States*, 354 U.S. 118 (1957), and *Bellis v. United States*, 471 U.S. 85 (1974), demonstrates that the doctrine was, in the main, a direct response to the privacy rationale at the core of *Boyd v. United States*, 116 U.S. 616 (1886), a case which focused on the sanctity of the *contents* of the records themselves.

However, this Court, in *Fisher*, abandoned the privacy rationale for Fifth Amendment claims with respect to business records, and replaced it with a compelled testimony standard. As applied to business records, the issue was no

longer the potentially incriminating nature of the contents of records, but whether the act of producing them was testimonial, compelled, and incriminating. *Fisher* thus changed the focus of the inquiry from what was "communicated" by the contents of the records themselves, to what was "communicated" by the individual's act of producing them.

This compelled testimony standard was subsequently applied in *United States v. Doe*, 465 U.S. 605 (1984), to uphold the Fifth Amendment claim of a sole proprietor who had been subpoenaed to produce his business records before a grand jury investigating him. The only factual difference between *Doe* and this case is that Braswell conducts business as a corporation.

Because of the Court's adoption of the compelled testimony standard, there is no sound basis for denying the privilege because of the *nature* of the entity whose records are sought, i.e., because of the collective entity rule. An examination of the justifications underlying the collective entity rule—the visitorial powers of the state, the needs of law enforcement, the waiver rationale, agency principles, and the non-private nature of corporate records—reveals that, in light of *Fisher*, a court cannot justify denying *any* custodian the right to assert his Fifth Amendment privilege when he is threatened with testimonially compelled self-incrimination.

The Fifth Amendment right of *any* records custodian, for any entity, be it huge corporation, one-man corporation, or sole-proprietorship, must be evaluated by reference to the three key components of the Fifth Amendment itself: compulsion, testimony, and incrimination. If this is done here, it becomes clear that the lower courts erred

in denying Braswell's right to assert his Fifth Amendment privilege.

The subpoena issued to Braswell as president of the corporation, is tantamount to asking him to produce *all* financial records underlying his personal income tax returns for the years in question, because he and the corporation are synonymous. In large measure, the Government's ability to indict and convict Braswell will depend upon its analysis of the financial records it has subpoenaed and the investigative leads it can glean from these records. But in this case, that ability will be greatly enhanced by what the Government will learn, not from the contents of the records, but from Braswell's act of producing them, i.e., from what the act of production will "add . . . to the sum total of the Government's information." *Fisher*, p.411.

The Government never challenged Braswell's assertion in the district court that the act of producing the corporate records would incriminate him. Indeed, under the "facts and circumstances" of this case, *Fisher*, at p.410, it is clear that he runs a serious risk of testimonially incriminating himself, by "authenticating" records, demonstrating his "possession and control," of them, and establishing the very "existence" of the subpoenaed records. *Fisher*, at p.410. Since Braswell has never admitted the existence of any records sought by the Government, nor admitted possession and control of any document, no testimonial aspect of the act of production in this case is a "foregone conclusion," *Fisher*, at p.411.

Therefore, if the Government wants the records from Braswell, it must formally immunize Braswell's act of

production pursuant to Title 18 U.S.C. §§ 6002-03. Any other alternative, e.g., the designation of a surrogate to produce the records, would be constitutionally unsatisfactory unless Braswell's act of production privilege extends to that which he would be called upon to communicate to the surrogate.

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ARGUMENT

I.

THE FOCUS OF THE PROTECTION AFFORDED BUSINESS RECORDS UNDER THE FIFTH AMENDMENT HAS SHIFTED FROM THE CONTENTS OF SUCH RECORDS TO THE TESTIMONIALLY INCRIMINATING ASPECTS OF THEIR PRODUCTION BY A GIVEN INDIVIDUAL.

A. INTRODUCTION

In law, as in any other discipline whose framework consists solely of intellectual concepts, it is often the simplest questions that evoke the most difficult and complex answers. Such is obviously the case with the straightforward issue raised by this uncomplicated proceeding. Even a cursory examination of relevant caselaw discloses that this Court, and many inferior ones, have devoted much thought to the values and principles implicated by this singularly narrow inquiry—with very disparate results.

This variety of judicial responses in the lower courts appears, however, to be the result of a confusing of the principles involved and, at times, a mischaracterization of the issues raised. To avoid the problems naturally re-

sulting from poorly defined questions, it is appropriate at the outset to make clear the issues petitioner has *not* brought to this Court:

(1) Braswell does not claim that the contents of business records are subject to a Fifth Amendment privilege; and

(2) Braswell has not asked this Court to determine whether the contents of truly private writings are protected by a Fifth Amendment privilege.[4]

What Braswell does claim is that he, as an individual, has a right to invoke his Fifth Amendment privilege against self-incrimination, because the government is compelling him to perform testimonial acts which might be incriminating. By complying with the subpoena issued by the grand jury, and producing the records called for by it, Braswell could incriminate himself in *all* of the ways discussed by this Court in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984). As will be explained *infra*, at pp. 40 to 46, complying with the *subpoena duces tecum* would compel Braswell to: (1) concede the existence of the records demanded; (2) inform

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[4] Although the United States Courts of Appeals for the Fifth Circuit wrote that "Braswell also argues that the contents of the books and records are protectible to the extent that the books and records are 'private writings,'" this was incorrect. Braswell expressly pretermitted the issue. The Fifth Circuit's ultimate disposition of this issue was, however, correct. "This issue was not presented to the district court. Thus whether or not this asserted privilege exists is not properly before us" (J.A., p.25).

the Government of the existence of documents of which it is now unaware; (3) make discretionary choices among documents in an attempt to respond to the broad demands of the subpoena; (4) admit possession and control of the documents subpoenaed; and (5) authenticate all of the records produced. Such conduct, even by a "custodian" of records, is clearly testimonial.

Equally clear is the fact that such "testimony" has always been protected by the Fifth Amendment, a point which an analysis of this Court's decisions makes manifest. All of this Court's cases have in one way or another reaffirmed the basic promise of the Fifth Amendment: no matter how great the government's need for evidence, an individual cannot be compelled to give *testimony* if such testimony might tend to incriminate him.[5]

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[5] This has always been the guarantee of the Fifth Amendment:

> The framers of the Bill of Rights saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty. L.Levy, *Origins of the Fifth Amendment*, (2d Ed., 1986), p.432.

B. FROM *BOYD* TO *BELLIS*: CONTENTS AND THE PRIVACY RATIONALE

There is a certain illogic in beginning an examination of the relationship between the Fifth Amendment and subpoenas for documents with an analysis of *Boyd*, because the "claim sustained in *Boyd* would now be rejected." *Fisher, supra*, p.408. On the other hand, *Boyd*, is a perfect point of departure, because it introduces to modern law many of the themes which continue to define the ways in which courts have approached this facet of our law.

In *Boyd*, the United States had instituted a forfeiture action against the E.A. Boyd & Sons partnership for allegedly importing glass into the United States without paying proper customs duties. To assist its proof at trial, the prosecution obtained a court order requiring the partnership to produce in court an invoice from a previous shipment of glass, an invoice which would establish the quantity and value of the glass in the earlier shipment. The partnership objected to the order, contending that it violated the Fourth and Fifth Amendments, but provided the invoice.

This Court struck down the order as unconstitutional. Justice Bradley, for the Court, wrote: "We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd, supra*, p.633. This principle was reiterated and broadened by the Court later in the opinion, when it said: "We are further of [the] opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment of the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634-635.

It matters not whether these core holdings of *Boyd* are founded in true privacy concepts, or in property concepts, as one writer has suggested,[6] because they were certainly developed by later Court decisions to reach contemporary definitions of privacy. See: e.g., *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Couch v. United States*, 409 U.S. 322 (1973). What does matter is the reality, noted by Justice White in *Fisher*, that, "several of *Boyd's* express or implicit declarations have not stood the test of time." *Fisher*, p.408.[7]

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[6] See: R. Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 Mo.L.Rev. 440, 444 (1984).

[7] Certainly, no court would now treat a business record (the invoice) prepared by a third party (the glass company) as a "private paper," nor would any consideration be given to the claim that a court order or *subpoena duces tecum* calling for the production of such a business record was *per se* an unreasonable search and seizure.

Twenty-one years after *Boyd*, the Court again considered similar questions, in *Hale v. Henkel*, 201 U.S. 43 (1906).

In *Hale*, the petitioner, a corporate officer, had been served with a grand jury subpoena duces tecum calling for the production of certain corporate records. He refused to produce them, claiming in part, a Fifth Amendment privilege not to do so.

The Court properly rejected this claim, on the grounds that an immunity statute protected the petitioner from any form of prosecution.—"The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply. *Hale, supra*, p. 67. Taking the next logical step, the Court then spurned the petitioner's attempts to assert the privilege *on behalf of the corporation* which owned the documents.

> But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privelege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this amendment really

> does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself; and if he cannot act up the privilege of a third person, he certainly cannot set up the privilege of a corporation.

Id. at pp. 69-70.

Having disposed of the Fifth Amendment issues, the *Hale* court then turned to *Boyd*, and the Fourth Amendment. Finding that decisions subsequent to *Boyd* treated "the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions," *Hale*, p.721, the Court determined that it was "quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence." *Id.* at 73.

The *Hale* Court's justification for this significant step away from *Boyd*, (the abandonment of the Fourth Amendment as a protector of privacy rights) was that because the corporation was a "creature of the State," and received certain special privileges and franchises from the State, the State had a "reserved right" to investigate the corporation. In the words of Justice Brown: "It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose." *Id.* at 75. This was the Court's first articulation of the "visitorial powers" doc-

trine. What should not be overlooked, as is often done in discussions of the doctrine, is that its initial application was in a case where a custodian had claimed a privilege regarding the *contents* of corporate records.

Four short years later, in *Wilson v. United States*, 221 U.S. 361 (1911) the question raised in *Hale* was back before the Court. In *Wilson*, as in *Hale*, the corporation's president refused to produce certain corporate books in response to a grand jury subpoena duces tecum on the grounds "that he [Wilson] believed that the *matters therein contained* would tend to incriminte him . . ." *Wilson*, p. 369. (emphasis added)

After first determining that the documents sought were "books," and not private papers, thus distinguishing the facts of the case from those of *Boyd;* the *Wilson* Court, relying heavily upon *Hale*, rejected the claim to the privilege by the corporation's representative. In doing so, the Court first reaffirmed the visitorial powers doctrine: ". . . the visitorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian." *Wilson* at 385. It then added a second justification for compelling the production of corporate records: the "waiver doctrine," *i.e.*, the idea that by accepting a corporate position, the officer is deemed to have waived his Fifth Amendment privilege with respect to the records of that corporation.

> The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to incriminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

Id. at 381-82.

Finally, the *Wilson* Court took a third step—it introduced the idea that a corporate officer is only an *agent* of the corporation, and as such, can have no personal privilege regarding the *corporation's* books.

> The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

Id. at 384-85.

While the Court addressed variations of the issues raised in *Boyd*, *Hale*, and *Wilson* in the interval between 1911 and 1943,[8] its decision that year in *United States v. White*, 322 U.S. 694 (1943) was the next major circumscribing of the reach of *Boyd*.

In *White*, the president of Local No. 652 of the International Union of Operating Engineers was served with a grand jury subpoena duces tecum calling for the production of, *inter alia*, the financial records of the union. The

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[8] See e.g.: *Essgee Co. v. United States*, 262 U.S. 151 (1923).

union president declined to produce the records, on the grounds that the records might tend to incriminate the union, him as an officer of the union, and him personally. *White*, *supra*, at 696.

Building on *Hale*, which had denied corporations a Fifth Amendment privilege regarding their records, and *Wilson*, which had denied the privilege to corporate representatives holding such records, the *White* Court laid the foundations of what would be called, after *Bellis v. United States*, 471 U.S. 85 (1974), the "collective entity doctrine." Justice Murphy, for the Court, held that because the Fifth Amendment privilege was a purely personal one, and because the "papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity," that individuals, when acting "as representatives of a collective group," cannot legitimately invoke a Fifth Amendment privilege. *White*, *supra*, at 699.

The Court's reasoning in support of its conclusion was that not only are such papers not "private," because they are "[u]sually if not always, . . . open to inspection by the members [of the organization], but also that recognition of the privilege would hamper criminal prosecutions: — "were the cloak of privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." *Id.* at 700.

The *White* Court was clearly cognizant of the fact that unincorporated organizations are not "creatures of the state," a fact which, strictly speaking, would make the "visitorial powers" doctrine inapplicable. Rather than abandon it, however, the Court simply broadened it:

> The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. *Hale v. Henkel*, *supra*; *Wilson v. United States*, *supra*. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.
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> It follows that labor unions, as well as their officers and agents acting in their official capacity, cannot invoke this personal privilege. This conclusion is not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

Id. at 700-701.

At the risk of being redundant, it must again be pointed out that the claimed privilege was for the *contents* of the records.

Union records were also the focus of this Court's next major discussion of the Fifth Amendment and the com-

pelled production of records. However, in *Curcio v. United States*, 354 U.S. 118 (1957), the question was not whether a union official had the right to refuse to produce the records because their contents might incriminate him, but whether he had a right to refuse to *testify* as to the whereabouts of such records. *Curcio, supra*, p. 119.

While *Curcio* is often given little more attention than those cases preceding it, an attentive reading of the decision shows that its implications may be more profound. While *Curcio* reaffirms the holdings of *Hale, Wilson,* and *White,* it does bring to the fore that which was unexpressed in earlier decisions of the court: the idea that courts must draw a distinction between a personal privilege as to the contents of organizational records (which will not be recognized), and a personal privilege as to testimony *about* those records, (which must be recognized). As Justice Burton wrote for the Court:

> The Government now contends that the representative duty which required the production of union records in the White case requires the giving of oral testimony by the custodian in this case. From the fact that the custodian has no privilege with respect to the union books in his possession, the Government reasons that he also has no privilege with respect to questions seeking to ascertain the whereabouts of books and records which have been subpoenaed but not produced. *In other words, when the custodian fails to produce the books, he must, according to the Government, explain or account under oath for their nonproduction, even though to do so may tend to incriminate him.*
>
> *The Fifth Amendment suggests no such exception.* It guarantees that "No person * * * shall be compelled in any criminal case to be a witness against himself * * *." *A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.* (emphasis added)

Curcio, pp.123-24.

As the preceding language makes clear, not only does the *Curcio* Court draw this all important distinction, it resolves the claim to the privilege by asking questions remarkably similar to those later found in *Fisher v. United States*, 425 U.S. 391 (1976), i.e., is there compelled testimony, and is it potentially incriminating? Finding that there was, the Court recognized the personal Fifth Amendment privilege of the records custodian.

In retrospect, this Court's opinion in *Bellis v. United States, supra,* must be seen as an unsuccessful effort to again adapt the privacy rationale to ever-changing forms of business organizations, and concomitant attempts to prosecute them and their members for criminal offenses. (The word unsuccessful is not used lightly—it is employed to emphasize the profound shift in the analysis used by the Court that came with *Fisher*, as discussed *infra*.) But *Bellis* cannot be ignored, simply because the concept at its core—the *Boyd* privacy rationale, is no longer the primary legal referent for Fifth Amendment claims. Because one significant aspect of *Bellis*, its expansion of *White's* collective entity doctrine, lives on, and continues to interject confusion into Fifth Amendment law regarding the act of production.

In *Bellis*, this Court considered whether a partner in a dissolved law firm had a Fifth Amendment privilege regarding the documents of that firm, which the government sought to obtain by means of a grand jury subpoena

duces tecum. The petitioner's claim to the privilege was rejected by the Court, primarily through an explication of two concepts developed in *White*: the privacy rationale, and the collective entity doctrine.

In *Bellis*, Justice Marshall, for the Court, acknowledged *Boyd* and its holdings regarding privacy under the Fourth and Fifth Amendments, and then juxtaposed those against that "long line of cases [that] established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession even if those records might incriminate him personally." *Bellis, supra*, p.88. To explain the reasons underlying this line of cases, which supplanted *Boyd*, the Court, in passing, referred to the "legitimate governmental regulation of such organizations." However, it devoted the preponderance of its discussion to the privacy rationale, and why the records of organizations fall beyond its protections.

In this discussion, the Court explicitly acknowledged the two antagonistic concepts that intersect when an individual is served with a subpoena for the records of an organization: the need for the protection of the individual's "inner sanctum[,] which necessarily includes an individual's papers and effects . . ."; and the right of the government to obtain the records of an organized collective entity. To resolve this tension, the Court developed *White's* analysis, which focused on the nature of the entity whose records were sought. As Justice Marshall wrote:

> The analysis of the court in *White*, of course, only makes sense in the context of what the Court described as "organized, institutional activity." 322 U.S., at 701, 64 S.Ct., at 1252. This analysis presupposes the existence of an organization which is recognized as an independent entity apart from its individual members. The group must be relatively well organized and structured and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity. In other words, it must be fair to say that the records demanded are the records of the organization rather than those of the individual under *White*.

Bellis, pp.92-93.

As a statement of law, *Bellis* certainly retains great import if there is to be any Fifth Amendment privilege regarding the *contents* of documents, an issue which is not now before this Court. *Bellis* obviously provides a means of determining the types of documents as to which a privacy interest might attach, by analyzing the entity which owns them. But *Bellis*, like all the Court's decisions before it, except *Curcio*, treats only a claim of privilege as to the *contents* of documents, not the testimonial aspects of producing them. That problem was not extensively considered by the Court until 1976, when it decided *Fisher v. United States*, 425 U.S. 391 (1976).

C. *FISHER* AND *DOE*—THE NEW COMPELLED TESTIMONY STANDARD

There is nearly universal agreement that this Court's decision in *Fisher* represents a marked shift in its approach to the Fifth Amendment and subpoenas for documents.[9] In *Fisher*, this Court turned away from the *Boyd*

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[9] See: *Fisher*, p.430 (Justice Marshall, concurring in the judgment)—"Today the Court adopts a wholly new approach for deciding when the Fifth Amendment privilege against self-in-

(Continued on next page)

privacy rationale, and to an analysis which focused solely on whether the facts involved compelled testimonial self-incrimination.

In *Fisher*, the attorney for the petitioner was served with an Internal Revenue Service summons calling for the production of documents which had been delivered to him by his client, documents which consisted of papers prepared by the petitioner's accountant. The attorney declined to comply with the summons, claiming, *inter alia*, that the enforcement of the summons would violate his client's Fifth Amendment privilege against self-incrimination. *Fisher*, p.395.

Justice White, writing for the Court, reasoned that although the Fifth Amendment "truly serves [the] privacy interests" one might have in the subpoenaed documents, that principle, standing alone, is not sufficient — there must be "compelled testimonial self-incrimination of some sort" before the protections afforded by the Amendment can be invoked. *Fisher*, p.399. As Justice White wrote:

> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private in-

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crimination can be asserted to bar production of documentary evidence."; R. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va.L.Rev. 1, 58 (1987)—"Much of what had come before became obsolete with the decision in *Fisher v. United States*, where the Court set out a new system for evaluating documentary subpoenas . . . ;" R. Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 Mo.L.Rev. 440, 470 (1984)—"The watershed opinion *Fisher v. United States* . . ."

> formation." *United States v. Nobles*, 422 U.S. 225, 233 n.7, 95 S.Ct. 2160, 2167, 45 L.Ed.2d 141 (1975).
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> Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described,'" *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614, 629 (1946); *In re Horowitz*, 482 F.2d 72, 75-80 (CA2 1973) (Friendly, J.); the First Amendment, See *NAACP v. Alabama*, 357 U.S. 499, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958); or evidentiary privileges such as the attorney-client privilege. (footnotes omitted)

Fisher, p.401.

What is implicit in the above passage is made explicit later in the opinion — the employment of the Fifth Amendment to create privacy concepts is "a rule searching for a rationale," one whose foundations "have been washed away." *Fisher*, p.409. The Court then turned to the precise question presented by this appeal—the scope of the protection afforded by the Fifth Amendment to the act of producing records.

In six paragraphs, this Court re-sketched the outlines of a doctrine whose application has since been litigated incessantly. The Court, working from the premise that the contents of non-private papers were not protected by the Fifth Amendment, held that nevertheless, *the act of producing such papers might be protected*, because of the "communicative aspects" of the act of producing evi-

dence.[10] As the Court noted, "compliance with [a] subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." To determine whether such testimonial elements existed in a given case, the Court would look to "the facts and circumstances of particular cases or classes thereof." *Fisher*, p.410.

Putting the matter more simply, Fisher changed the focus of the inquiry from what was "communicated" by the contents of the documents to what was communicated by producing them. The remaining components of the inquiry, whether the testimony was compelled, and whether it was potentially incriminating, remained unchanged.

Although the Fifth Amendment claim of the petitioner in *Fisher* was ultimately rejected by the Court, *it was not denied because the documents belonged to a collective entity*. Rather, the Court looked to those aspects of the act of production which are testimonial, and found that in Fisher's case, "the act of producing them — the only thing which the taxpayer is compelled to do — would not itself involve testimonial self-incrimination." *Fisher*, p.411.

Fisher, with its uncomplicated compelled testimony analysis, had the potential to put an end to the confusion

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10 It should be noted that the *Fisher* Court, at the very inception of its discussion of the act of production doctrine, makes reference to *Curcio*. As was pointed out earlier, *Curcio* drew an express distinction between a claim of privilege as to the contents of business records, and a claim of privilege as to testimony *about* the records.

The act of production doctrine did not, however, originate with *Curcio*, as *Curcio* itself indicates. *Curcio, supra*, p.125, citing *United States v. Austin-Bagley Corp.*, 31 F.2d 229 (2nd Cir. 1929); see also: *Curcio*, p.125, fn. 3. The doctrine may have originated with Wigmore, in 1904. See: J. Wigmore, *Evidence*, § 2264 (1904).

which plagued the lower courts as to the scope and applicability of the Fifth Amendment to subpoenas for documents. Obviously, that potential has not been realized, even though the tenets of *Fisher* were reiterated just eight years later, in *United States v. Doe*, 465 U.S. 605 (1984).

It is not unfair to say that this Court's opinion in *Doe* represents nothing more than a straightforward application of the tripartite inquiry described in *Fisher*. *Doe* clearly holds that once it is assumed that the contents of the documents are not privileged, then three, and only three questions need be asked with respect to the act of production:

(1) Is there governmental compulsion;

(2) Is the Government compelling testimony, or conduct which is testimonial;

(3) And, could the individual whose testimony is being compelled be personally incriminated by it?

In *Doe*, the owner of several sole proprietorships was served with five grand jury subpoenas duces tecum calling for the production of the business records of those organizations. His motion to quash those subpoenas was granted by the district court, except with respect to "required records," because the act of producing those records would incriminate the proprietor.

The judgment of the district court was affirmed by the Court of Appeals, on two separate grounds. That Court first found that the *contents* of the records were privileged, because they were "private papers." It then went on to find that regardless of the contents of the documents, because the act of producing them would have incriminating "communicative aspects of its own," the proprietor was not required to produce them. *Doe*, p.609.

This Court, employing its holding in *Fisher*, reversed the Court of Appeals' holding with respect to the *contents* of the records, stating: "Where the preparation of business records is voluntary, no compulsion is present." *Doe*, p. 610.

This Court's examination of the second aspect of the ruling of the Court of Appeals was lengthier, but equally, consistent with *Fisher*. Accepting "the explicit finding of the District Court that the act of producing the documents would involve testimonial self-incrimination," *Doe*, p. 613, this Court affirmed the judgment of the Court of Appeals insofar as it upheld the Fifth Amendment privilege with regard to the act of production. *Doe*, p. 614.

Of greatest importance is the fact that this Court in *Doe*, as in *Fisher*, made its determination as to the *availability* of the privilege without tying it to the *nature* of the entity whose records are sought, i.e., without a *Bellis* collective entity analysis. This surely was not a mere oversight, but instead, a recognition, on some level, that our law had again evolved, as it so plainly has.

Starting with *Boyd's* determination that the Government cannot obtain any "private papers," which at that time included business records, the Court has, step by step, established the Government's right to the contents of basiness records. This right has been supported by various justifications, such as the visitorial powers doctrine, and the implied waiver doctrine, and most recently, by the collective entity doctrine. Co-existing with this progression has been this Court's repeated pronouncements that an individual cannot be compelled to incriminate himself, through testimony, or testimonial acts.

But the peaceful coexistence of these two rights ends when the records custodian of a collective entity receives

a subpoena for the records of that entity, and he or she might be personally incriminated by producing those records. At such time, a choice must be made in favor of one right or the other. As will be shown, the choice must be made in favor of recognizing the individual's right to invoke the Fifth Amendment.

II.

THE RATIONALE UNDERLYING THE COLLECTIVE ENTITY DOCTRINE, WHICH DENIES FIFTH AMENDMENT PROTECTION TO A CORPORATION WITH RESPECT TO RECORDS, IS NOT AN APPROPRIATE BASIS FOR THE DENIAL OF FIFTH AMENDMENT PROTECTION TO THE INDIVIDUAL CUSTODIAN OF CORPORATE RECORDS WHO IS COMPELLED TO INCRIMINATE HIMSELF PERSONALLY BY THE ACT OF PRODUCTION.

A. INTRODUCTION

Although this Court has never addressed the conflict between the Government's right to records, and the right of a custodian of organizational records not to incriminate himself through his act of producing them, numerous lower courts have. At the risk of understatement, it can be said that the results have not been consistent.[11]

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[11] Compare: *In Re: Sealed Case*, — F.2d — (D.C. Cir. 1987) (No. 87-5256, decided Nov. 6, 1987); 42 Cr.L.Rep. 2120; *In re Kave*, 760 F.2d 343 (1st Cir. 1985); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2nd Cir. 1985); *In re Grand Jury Subpoena Issued to Thirteen Corporations*, 775 F.2d 43 (2nd Cir. 1985); *United States v. Antonio J. Sancetta, M.D., P.C.*, 788 F.2d 67 (2nd Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3rd Cir. 1985) (en banc); *In re Grand Jury Empanelled 3-23-83*, 773 F.2d 45 (3rd Cir. 1985); *Special Federal Grand Jury Empanelled October 31, 1985 Impounded*, 819 F.2d 56 (3rd Cir. 1987); *United States v. Lang*, 792 F.2d 1235 (4th Cir. 1986) *cert. denied* — U.S. —, 107 S.Ct. 574 (1986); *In re Grand*

(Continued on next page)

There is, however, a common inquiry running through all of these decisions:

> What is the relevance of *Bellis*, specifically, its articulation of the collective entity doctrine, to an analysis of Fifth Amendment issues under a compelled testimony standard? Not surprisingly, a number of courts have decided that it has none, for obvious reasons. As one writer has so aptly put it:
>
> > The distinction between personal and organizational documents followed naturally from a privacy standard. It cannot, however, be justified under a compelled testimony standard. The privacy standard directed the Court to examine the nature of the documents and the privacy interests the individual had in them. This inquiry necessarily yielded different results when applied to personal documents than when applied to organizational documents. Under the compelled testimony standard, however, the Court asks whether the government compelled evidence and, if so, whether the evidence is testimonial in nature. The answers to these questions do not and cannot logically hinge on the nature of the documents' contents or owners.
> >
> > Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv.L.Rev. 640, 647 (1986)

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Jury Proceedings (Morganstern), 747 F.2d 1098 (6th Cir. 1984), rev'd 771 F.2d 143 (1985) (*en banc*) *cert. denied* — U.S. —, 106 S.Ct. 594 (1985); *In re Grand Jury No. 86-3 (Will Roberts Corporation)*, 816 F.2d 569 (11th Cir. 1987): with: *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130 (5th Cir. 1985); *United States v. Huckaby*, 776 F.2d 564 (5th Cir. 1985); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985) (*en banc*); *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857 (8th Cir. 1986) *cert. granted sub nom. See v. United States*, — U.S. —, 107 S.Ct. 59; *cert. dismissed*, — U.S. —, 107 S.Ct. 918 (1987); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941 (10th Cir. 1984); *cert. denied* 469 U.S. 819 (1984); and *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986).

> Or in the words of Judge Gibbons of the Third Circuit Court of Appeals, in *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3rd Cir. 1985) (*en banc*):
>
> > The government urges that the holding in *United States v. Doe* does not control because in *Doe* the records were those of a sole proprietorship, while in this case they belong to a professional corporation. *That argument misses the whole point of the Court's analysis in Fisher and Doe.*[2] Those cases consistent with *Schmerber v. California*, make the significant factor, for the privilege against self-incrimination, neither the nature of the entity which owns documents, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled. *Brown, supra*, p. 528 (emphasis added).

The "untenability" of a suggestion "that *Bellis* would require a custodian to produce documents where the act of production is both communicative and incriminatory," *id.*, is brought into sharper focus when the components of *Bellis* are examined.

As was seen in the preceding review of this Court's decisions, *Bellis*, and the cases cited therein, are actually an amalgamation of justifications for encroachments upon

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(Footnote from the above text)

[2] The government places great reliance on *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974), but *Bellis* stands only for the proposition that the custodian of a collective entity's documents has no Fifth Amendment privilege with respect to the incriminating contents of those documents. *Bellis* did not urge, and the Court did not consider, the often communicative and incriminatory nature of the act of production. *See* Brief for Petitioner, *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974). Thus, the holdings in *Fisher* and *Doe* render untenable any suggestion that *Bellis* would require a custodian to produce documents where the act of production is both communicative and incriminatory.

Boyd's holdings.[12] These justifications have included: the visitorial powers doctrine—*Hale*; the waiver doctrine—*Wilson;* agency concepts—*Wilson*; and a lack of a privacy interest because the documents belong to a collective entity—*White* and *Bellis*. When each of these is closely examined, however, it becomes clear that they are not viable under a compelled testimony standard.

B. THE VISITORIAL POWERS OF THE STATE

Whatever the visitorial powers of the government might be, it must be noted that they are not necessarily implicated or challenged when a privilege is claimed regarding the production of organizational records. A custodian claiming this privilege is not denying the Government's right to the records, he is simply denying the Government's right to obtain the records from *him*.

Further, the visitorial powers doctrine has always had as its only object the *contents* of *voluntarily* created documents. And whenever the Government has attempted to shift that focus, and has sought to utilize the doctrine where the element of compulsion *was* present, this Court has soundly rejected such efforts:

> The Government suggests that subpoened corporate and association records will be obtained more readily for law enforcement purposes if their custodian is threatened with summary commitment for contempt in failing to testify as to their whereabouts, rather than with prosecution for disobedience of the subpoena to produce the records themselves. We need not concern ourselves with the relative efficacy of those procedures. There is a great difference between them. The compulsory production of corporate or association

12 Although significant portions of the Court's opinion in *Bellis* are devoted to the question of what constitutes a collective entity, by quotation or citation *Bellis* reaffirms all of the Court's earlier justifications underlying the government's "right" to business records.

> records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, *forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment.* (footnote omitted) (emphasis added)

Curcio, 354 U.S. at 127-128.

As the above quotation makes clear, part of the *animus* behind the visitorial powers doctrine is the *need* for corporate records for "law enforcement purposes." Pretermitting the question of whether the Government's needs ever justify curtailing or eradicating fundamental constitutional rights, the recognition of a Fifth Amendment right for all records custodians should have only a *de minimus* impact on law enforcement.

> The removal of the distinction between personal and organizational documents may only marginally impair the government's ability to prosecute individual wrongdoers successfully. Under the compelled testimony standard announced in *Fisher*, the fifth amendment protects not the contents of documents, but only the act of producing them. The government could obtain the contents of documents by immunizing the act of production. The government could then use the contents against any officer of the company, including the person to whom immunity was granted. *Prosecutions would thus fail only when the act-of-production testimony itself was critical to the government's case. Although such situations would arise, they would almost certainly be the exception rather than the rule. Not surprisingly then, a number of federal prosecutors do not believe that their efforts to prosecute organizations would unduly suffer from extending the fifth amendment privilege to personal-*

ly incriminating organizational documents. (footnotes omitted) (emphasis added)

Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv. L. Rev. 640, 649-650 (1986)

C. THE WAIVER DOCTRINE

It certainly cannot be said that the waiver doctrine, which originated with *Wilson*, has fallen into disuse—the Fifth Circuit employed it in this case: "Organization records, subject to the visitorial powers of the state and review by the organization's members, must be produced by the custodian, who, by accepting his corporate office, is deemed to have waived his privilege with respect to any testimonial incrimination inherent in the act of production." citing *United States v. White*, 322 U.S. 694, 700 (1944). (J.A., pp. 23-24)

It is one thing, however, to read a waiver into proceedings dealing with the *contents* of *voluntarily* created documents. It is quite another to apply it to those situations which have governmental compulsion at their very core. As this Court wrote in *Marchetti v. United States*, 390 U.S. 39 (1967):

> We find this reasoning no longer persuasive. The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See, *e.g.*, *Carnley v. Cochran*, 369 U.S. 506. Compared *Johnson v. Zerbst*, 304 U.S. 458; and *Glasser v. United States*, 315 U.S. 60. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation." (citations omitted)

Id. at 51-52.

If a custodian does not waive his right not to condemn himself by giving testimony regarding records, *Curcio*, how can that custodian logically be compelled to testify by producing them, and thus condemn himself in that same fashion.

Furthermore, an application of the waiver doctrine to custodians who would be personally incriminated by an act of production would run counter to every other decision of this Court dealing with the waiver of constitutional rights. The adjectives *always* found in conjunction with the waiver of any right of the magnitude of the Fifth Amendment are: knowing, intelligent, and voluntary. See, e.g. *Moran v. Burbine*, — U.S. —, 106 S.Ct. 1135 (1986).

To inform Braswell now that he has waived certain Fifth Amendment rights because years ago he innocently chose to form a corporation to conduct his business (See pp. 4-5, *supra*) stands these adjectives and the decisions which give them meaning on their head.

D. THE CUSTODIAN AS AGENT FOR THE CORPORATION

Before its adoption of a compelled testimony standard, the Court, in *Wilson, Ex parte v. United States*, 262 U.S. 151 (1923), and *White*, treated records custodians as mere

agents of the corporation. These decisions then reasoned that because of this status, no personal privilege would attach, presumably because it was not a question of the individual incriminating himself, but rather one of the corporation incriminating the individual, or itself. Although these decisions were limited to issues regarding the *contents* of records, other courts have applied this rationale to the act of producing records.[13]

There is a certain neat logic to the argument that because it is the corporation (through an agent) producing the records, it is the corporation's act, not the agent's. This logic, however, is fundamentally flawed, because it ignores the thrust of the element of compulsion.

A corporation can be compelled to turn over records because it has no Fifth Amendment privilege. For the same reason, it can be required to turn over records which incriminate individuals. And a custodian can be called upon to turn over a corporation's records, even when the *contents* of those records incriminate the custodian, not only because the corporation has no privilege, but because the custodian has not been *compelled* to *incriminate* himself—whatever is incriminatory about the records existed before the subpoena, and was created voluntarily, i.e., was not compelled. But when the Government selects a specific individual, even as "agent," and compels *that individual*

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[13] See: *In re Grand Jury Subpoena (85-W-71-S)*, 784 F.2d 857, 861 (8th Cir. 1986) *cert. granted sub nom. See v. United States*, — U.S. —, 107 S.Ct. 59 (1986); *cert. dismissed*, — U.S. —, 107 S.Ct. 918 (1987)—"Production of corporate records by Cunningham, or by appellant as his attorney, would be an action taken in his representative capacity only, either as a former corporate officer or as a trustee of the defunct Westech Corp., and not as an individual."; *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir. 1985) (*en banc*) *cert. denied* — U.S. —, 106 S.Ct. 594 (1985).

to respond to a subpoena, and this response will create evidence which incriminates him, not as "agent," but as an individual, the proscriptions of the Fifth Amendment should obviously apply.

The word "obviously" is not used rhetorically. Accepting the Eighth and Sixth Circuits' agency argument at face value, why could a court not compel the "agent" to testify before a grand jury? If an agent can be compelled to perform incriminating testimonial acts because he does them as an agent, why not simply put the agent before the grand jury, and ask him questions, as an agent, about the corporation, which has no privilege, or about the contents of the corporation's records, which are not privileged, or about his activities within the scope of his *corporate* employment. Certainly no court would permit this. And certainly this Court should not permit its corollary—a compelled act of production whose testimonial aspects would personally incriminate the "agent" making the production.

E. THE PRIVACY INTEREST

Unquestionably, the collective entity rule serves the privacy rationale. The analytical methodology employed in *Bellis* is purely an examination of privacy interests through the lens of the entity which owns the documents. And if, as has been argued throughout this brief, the entire privacy standard for business records has been replaced by a compelled testimony standard, it makes little sense to view the act of producing records through such a lens.

Any determination of the availability of a Fifth Amendment privilege which is a function of the entity whose records are sought, or which relies on concepts such as visitorial powers, waiver, or agency, is simply unwork-

able, and inconsistent with *Fisher* and *Doe*. The Fifth Amendment rights of *any* records custodian, for any entity, albeit huge corporation, one-man corporation, or sole-proprietorship, must be evaluated by reference to the three key components of the Amendment itself: compulsion, testimony, and incrimination. As will be seen *infra*, all three are present in Braswell's case.

III.

BRASWELL, AS THE SOLE SHAREHOLDER OF A ONE-MAN CORPORATION AND CUSTODIAN OF ITS RECORDS, PROPERLY ASSERTED HIS FIFTH AMENDMENT ACT OF PRODUCTION PRIVILEGE AS TO SUCH RECORDS SUBPOENAED BY A GRAND JURY CONDUCTING A TAX FRAUD INVESTIGATION OF HIM.

Accepting the premise that a Fifth Amendment privilege exists for records custodians, it is necessary to look at the "facts and circumstances" of this case to see if Braswell has properly invoked it. *Fisher*, p. 410.

It is known that the government is in the middle of a tax fraud investigation of Braswell with respect to his 1982, 1983, 1984 and 1985 personal income tax returns, and that it already has those returns. Implicit in its investigation is the Government's belief that Braswell has understated his income, overstated his deductions, or has otherwise willfully falsified some aspect of his tax returns. See 26 U.S.C. §§ 7201, 7206(1), and 7206(2).[14] The subpoena issued to Braswell as President of Worldwide Machinery Sales, Inc. and Worldwide Purchasing, Inc., is tantamount to asking him to produce *all* financial records underlying his personal income tax returns for the years

[14] The investigation, insofar as it involves the corporate returns, would have as its only likely human target, Randy Braswell, for aiding and abetting in the preparation of a false corporate return.

in question.[15] Because Braswell has chosen to operate under the corporate form, and because of the identity of Braswell and the corporation,[16] the records subpoenaed are also those of the corporation (See *supra*, at pp. 4-7).

In large measure, the government's ability to indict and convict Braswell will depend upon its analysis of the financial records it has subpoenaed, and the investigative leads it can glean from these records.[17] But in this case, that ability will be greatly enhanced by what the government will learn, not just from the contents of the records, but from Braswell's act of producing them, i.e., from what the act of production will "add . . . to the sum total of the government's information." *Fisher*, p. 411.[18]

[15] The subpoena is extremely broad in scope. It calls for production of "all books, records, papers, and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984, 1985, to include, but not limited to the following: (1) Receipts and disbursements journals. (2) General ledger and subsidiaries. (3) Accounts receivable/accounts payable ledgers, cards, and all customer data. (4) Bank records of savings and checking accounts, including statements, checks, and deposit tickets. (5) Contracts, invoices-sales and purchase, conveyances, and corresepondence. (6) Minutes and stock books or ledgers. (7) Loan disclosure statements and agreements. (8) Liability ledgers. (9) Retained copies of Forms 1120, W-2, W-4, 1099, 940, and 941 (J.A. at pp. 6-7).

[16] There are actually two corporations, but for purposes of this discussion the two corporations are treated as a single entity.

[17] Virtually every tax fraud investigation has as its starting point the taxpayer's financial records. For the enormous significance of such records in a tax fraud investigation, see §§ 30-33 of the *Criminal Tax Manual*, published by the Criminal Tax Section of the United States Department of Justice, and the *Handbook for Special Agents*, published by the Internal Revenue Service, and provided to each of its criminal investigators.

[18] The subpoena itself states that Braswell may comply with the subpoena, without making an appearance by the grand jury by delivering the subpoenaed records to the agent serving the subpoena upon him. The service was made by the Internal

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Since the subpoena in this case satisfies the compulsion element of the compelled testimony standard, *Fisher*, p. 409, it is appropriate to turn directly to the testimonial aspects of the act of production, as identified in *Fisher*. As the Court noted, "[c]ompliance with [a] subpoena tacitly concedes the existence of the papers demanded, and their possession and/or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." *Fisher*, p. 410.

Because the Government has demanded *all* of Braswell's business records, it is reasonable to assume that compliance with the subpoena would compel Braswell not only to confirm the existence of records which the Government is now aware, but also to disclose the very existence of particular documents of which the Government is ignorant. As one commentator so concisely put it: "The critical question here is what the government knows: does revealing the existence of [a] document through its production inform the prosecution of a source of incriminating evidence of which it was previously ignorant."[19]

The records subpoenaed in this case are, in the vernacular, a potential goldmine of such sources. The records may contain the names of individuals with whom Braswell may have conducted financial transactions with tax implications. Documents are called for which may reflect taxable financial transactions which were not re-

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Revenue Service's Special Agent conducting the investigation. Obviously, she would be free to testify to Braswell's production of the records, from which would flow all the Fifth Amendment implications stemming from Braswell's production to the grand jury.

[19] R. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1, 27 (1987).

ported on the tax returns. The records sought may reflect that items expensed on the corporate returns were in fact of a personal non-deductible nature. Although the Government in this case has not been called upon to delineate what it knows, it is reasonable to infer "from the broad sweeping summons . . . that the government is attempting to compensate for its lack of knowledge by requiring [Braswell] to become the primary informant against himself . . . It is precisely this sort of fishing expedition that the Fifth Amendment was designed to prohibit." *United States v. Fox*, 721 F.2d 32, 38 (2nd Cir. 1983).

With respect to "possession and control," by definition production of subpoenaed records testimonially communicates this fact, from which an inference of guilty knowledge may be drawn if the records contain incriminating material. See *infra*, p. 45.

The last testimonial aspect of production discussed by *Fisher*, authentication, is present with equal force in this case. The very breath of the subpoena's language is such that it requires Braswell to choose, and hence implicitly acknowledge, which "records" or "other data" in his possession relate to the corporation, and which, if any, are personal. As to the traditional business records called for, e.g., the various journals, ledgers, and subsidiary books of account, production would automatically permit their introduction in any ensuing prosecution. Fed. R.Evid. 901 and 401.

Given the paramount importance of records in tax prosecutions, linking these records to Braswell could be critical. As the Second Circuit said in *United States v. Fox*:

> . . . In this case, who prepared the records is far less important than the fact that they are Fox's records. What the government would need for authentication here is exactly what Fox would provide by production—an admission that the subpoenaed documents are records pertaining to his business or to the finances and claimed deductions of him and his wife. (citations omitted) . . . If Dr. Fox delivers the summoned records to the IRS, that act, in and of itself, may be sufficient to authenticate the records at a subsequent criminal trial against him. (citations omitted). We believe that Dr. Fox's compliance with the summons would implicitly authenticate the documents as his own, and thereby provide a link in a chain of evidence that may incriminate him.

721 F.2d at 39-40.

As *Fisher* makes clear, it is not enough that the act of production constitutes testimonial compulsion, the element of "incrimination" must also be present. While the articulation of the incrimination standard has not been cast in stone, at its core is a requirement that production of the document present a "realistic" and not "insubstantial" threat of incrimination; that it provide a link in the chain of evidence that might incriminate the producer. *Fisher*, at p.413; *United States v. Marchetti*, 390 U.S. 39, 53 (1967); *United States v. Hoffman*, 341 U.S. 479, 486 (1951).[20]

Certainly the hazards confronting Braswell are "substantial and real, and not merely trifling or imaginary."

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[20] Although the Government has, on appeal, stated: "Petitioner has yet to demonstrate how his act of production would be self-incriminating," (Brief for United States in response to the Petition for a Writ of Certiorari, p.7), Braswell's assertion that he might be incriminated by the act of production was accepted by the Government at the District Court level without question—for obvious reasons.

Marchetti, supra. See also *Doe, supra*, p. 614, f.n. 13. As to any financial transaction with tax consequences which was omitted from the tax return, the existence of which was unknown to the Government but for a record to be produced in compliance with the subpoena, the incriminating factor would surely be satisfied. For example, "loan" documents and "liability ledgers" could well alert the Government to the existence of financial transactions of which it had no knowledge, and which were omitted from the tax return. Braswell's possession of "contracts," "conveyances," or "correspondence," relating to such unreported taxable transactions would, moreover, give rise to an inference that he had knowledge of the omitted transaction, and that its omission from the tax return was willful and/or tax-evasion motivated. See, *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Bishop*, 412 U.S. 346 (1973); *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Ashfield*, 735 F.2d 101 (3rd Cir. 1984), *cert. denied* 469 U.S. 858 (1984). Indeed, any item on the books and records of the corporation which is at variance with the way the item was treated on the corporate tax return, or should have been treated on Braswell's personal tax return, would provide a reasonable inference at a criminal tax trial that Braswell willfully and knowingly violated the Internal Revenue Code.

Because Braswell has never conceded the existence of any record sought by the Government, nor admitted possession and control of any document, no testimonial aspect of the act of production in this case is a "foregone conclusion." See: *Fisher*, p.411. In any event, the concept calls for an on-the-record rebuttal of Braswell's claim by the production of "evidence that possession, existence and authentication" is a "foregone conclusion." *Doe*, at p.614,

themselves personally by producing the records of an organization on the basis that the organization has no fifth amendment rights. The government fails, or refuses, to recognize that it is the personal fifth amendment right of the records custodian that is implicated here, just as it was in Doe. The nature of the entity involved simply has no relevance to this issue.

In the scenario described, had the subpoena sought oral testimony concerning the relationship of certain records to a questioned transaction, or the production of personal records such as tax worksheets, amicus believe that the answer would be obvious; the custodian would be entitled to assert his fifth amendment right not to incriminate himself. However, because the corporation, or other collective entity, has no fifth amendment

protection, the lower courts have taken inconsistent and confusing positions when the subpoena seeks the production of corporate records or the records of any other organized entity. It is the position of amicus that the confusion is unwarranted and that subpoenas for corporate records can be enforced with due regard for both the fifth amendment rights of the custodian and the government's right of access to corporate documents.

A. A Records Custodian For An Organization Retains His Personal Fifth Amendment Privilege Not To Incriminate Himself, Either Tacitly Or Orally.

This Court has made clear that the fifth amendment means exactly what it says: "No person ... shall be compelled in any criminal case to be a witness against himself." In Fisher v. United

States, 425 U.S. 391 (1976), and then again in Doe, this Court held that the contents of voluntarily created documents are not protected by the fifth amendment, putting to rest the historic distinction between the contents of private papers and the contents of papers belonging to collective entities articulated in earlier cases. See Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911); Boyd v. United States, 116 U.S. 616 (1886).

In Fisher, however, this Court made equally clear that the fifth amendment applied equally to tacit testimony and oral testimony, and that when the act of producing non-privileged documents was both testimonial and incriminating, the act itself was protected by the fifth amendment. Amicus believe that the logic

of Fisher and Doe is equally compelling when applied to a custodian of an organization's records. The act of production doctrine clearly does not depend upon the privileged nature of the documents as personal documents receive no greater protection than the documents of a collective entity. Amicus believe that the application of the act of production doctrine also should not depend upon whether the custodian is acting as a representative as testimony given as a representative can be used against the representative personally. In re Special Federal Grand Jury Empanelled October 31, 1985, 819 F.2d 56 (3d Cir. 1987). The custodian of documents belonging to any organization -- regardless of size -- should be entitled to refuse to perform the act of producing the organization's documents when that act would be

testimonial and incriminating to the custodian personally.

A number of decisions, including the decision of the Fifth Circuit below, have attempted to avoid the clear message in Fisher and Doe by finding that the custodian of an organization's records waives his personal fifth amendment privilege by accepting possession of the records. In re Grand Jury Proceedings: John Doe, 814 F.2d 190 (5th Cir. 1987). Amicus believe that this view is erroneous, and support petitioner's argument that he retains his personal fifth amendment rights.

The well-entrenched rule denying fifth amendment protection to corporations or other collective entities does not require that the records custodians for those entities in essence waive their personal fifth amendment protection, even

if no one other than the custodian can produce the records.

This Court expressly rejected the argument that a custodian could be compelled to give oral testimony concerning the location of a collective entity's records in Curcio v. United States, 354 U.S. 118 (1957). Amicus believe that there is no legitimate distinction between compelled oral testimony concerning the records and compelled tacit testimony concerning the records, and that the dicta in Curcio to the contrary is no longer valid in light of this Court's recognition of the testimonial content of the act of producing records in Fisher v. United States, 425 U.S. 391 (1976) and Doe.

This Court has not lightly inferred a waiver of fifth amendment protection in the past, and there is no

compelling reason to saddle records custodians with such a waiver now. Although there is language in Curcio indicating that the custodian of a collective entity's records somehow waives the fifth amendment protection as to the existence and authenticity of those records, that language was pure dicta that does not reflect this Court's later recognition of the testimonial content of the act of producing records, nor is it consistent with this Court's treatment of fifth amendment waiver in analogous situations.

This Court has consistently refused to allow either state or federal governments to demand waiver of fifth amendment protection as a prerequisite to engaging in a given activity, even when the activity itself is entitled to no protection. In Marchetti v. United

States, 390 U.S. 39 (1968), the government sought to sustain a requirement that persons engaging in gambling activity register with the Internal Revenue Service. The government argued that nobody was required to gamble, and hence the decision to gamble could be made to carry with it a requirement of registration. This Court rejected this claim, observing:

> The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it.... To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation."

390 U.S. at 51-52.

Similarly, this Court has consistently struck down legislation requiring that public officers and others engaged in business affecting the public waive their fifth amendment privilege. See Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (striking down statute requiring state political party officer to waive fifth amendment); Lefkowitz v. Turley, 414 U.S. 70 (1973) (striking state statute requiring contractors to waive fifth amendment as to public contracts); Gardner v. Broderick, 392 U.S. 273 (1968) (striking statute requiring policemen to waive fifth amendment).

In each of these situations, the persons being asked to waive the fifth amendment protection were clearly notified by means of published statutes or

regulations that they would be required to waive their rights if they engaged in the activity. In each of these cases the persons chose to engage in the activity and yet assert their fifth amendment right. In none of these cases did this Court uphold the waiver of fifth amendment rights.

In this case, the argument for implying any waiver of fifth amendment protection is much weaker, as the custodian could not possibly have known that simply taking possession of the organization's records would entail a waiver of his personal fifth amendment rights as to testimony about the existence and authenticity of the records, or about the relationship between certain records and specified activity. Indeed, it is not always clear that a group qualifies as an "organized entity" under the analysis in

Bellis v. United States, 417 U.S. 85 (1974), until a court determines the status of the organization. If it cannot be said that a gambler waives his rights by engaging in gambling in the face of a clear statutory registration requirement, or that a policeman waives his fifth amendment rights by undertaking a career that requires waiver by statute, then it certainly cannot be said that the custodian of records waives his personal fifth amendment rights by taking possession of an organization's records.

Amicus believe that the result is not affected by any analogy to cases governed by the required-records doctrine. Although both "required records" and records of organizations lack fifth amendment protection, not all organizational records can be equated to "required records" as most are not

required to be created or maintained by statute or regulations. See In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983, 722 F.2d 981 (2d Cir. 198_) (corporate records are not always required records); see also Grosso v. United States, 390 U.S. 62 (1968) (discussing limits of "required records"); Shapiro v. United States, 335 U.S. 1 (1948). Indeed, Doe and Fisher appear to be in direct conflict with any decision holding that the government may require an individual to create records that may later be used against him, as opposed to statutes similar to that in question in Shapiro, which simply required the individual to maintain categories of voluntarily created records.

B. A Grant of Statutory Use Immunity Is The Appropriate Means Of Protecting The Rights Of Both The Government And The Custodian.

There are two situations presented when the government seeks to obtain the records of an organization; either the organization will have someone capable of producing the records without incriminating himself, or the only person with sufficient knowledge of the organization's records to comply with the subpoena will have a valid fifth amendment right not to perform the act of producing the records. In the first situation, the government may simply serve the subpoena upon the organization and allow the appropriate person to produce the records. In the second situation, however, amicus believe that the only solution that properly balances the needs of both the government and the custodian is a grant of

statutory use immunity pursuant to 18 U.S.C. §§ 6002 and 6003.

Several circuits have recognized that the custodian of an organization's records has a personal fifth amendment right not to perform the act of production when that act would be personally incriminating. These circuits, however, have not yet developed a consistent policy for dealing with the situation presented when a corporation has no employee or agent who can comply with the subpoena without incriminating himself. In United States v. Barth, 745 F.2d 184 (2d Cir. 1984), cert. denied 470 U.S. 1004 (1985), the court recognized that a corporate agent may have a personal fifth amendment privilege not to perform the act of producing corporate records, and approved an order requiring that the corporation appoint an agent capable of performing the

act of production. This "solution" has been repeatedly approved. See, e.g., In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985); In re Grand Jury No. 86-3 (Will Robert Corp.), 816 F.2d 569 (11th Cir. 1987).

The problem with this solution is that it ignores the practical problem created when an organization does not have someone who can produce the documents without incriminating himself personally. By definition the problem only arises when compliance with the subpoena requires some knowledge of the records; if a raw outsider could identify and authenticate the records it is unlikely that the corporation's agents would have a valid fifth amendment claim to begin with. An order that the organization find such an outside agent, then, presupposes that the new agent will be able to obtain the

information needed to comply with the subpoena from the existing agents, the very people who have a fifth amendment right not to incriminate themselves by revealing this information. Should the corporation's existing agents continue to assert their fifth amendment right and refuse to talk to the newly appointed agent, nothing will have been accomplished. Should the existing agents reveal the information needed to identify the records, perhaps thinking this is required under the Court's order, their fifth amendment rights will have been unwittingly waived, as the newly appointed agent will now be able to testify as to their statements to him. The appointment of a new agent, then, only "solves" the problem if the existing agents do not realize the implications of helping the newly appointed agent gather the records.

The Circuits that have been confronted with this situation have not successfully dealt with all of the implications. For example, in In re Grand Jury No. 86-3 (Will Robert Corp.), the Eleventh Circuit blithely stated that the corporation's president, who was the target of a criminal investigation and had a valid personal fifth amendment right not to perform the act of production, could be ordered to appoint an agent who could perform the act of production and could be required to produce the documents to the new agent. The Court based this holding on the ground that "a corporate representative - even the corporation's sole representative - does not commit a testimonial act by providing general corporate records to an agent selected by the corporation." 816 F.2d at 574. This is not true; if the custodian's act of

producing the records before the grand jury is testimonial, then the exact same act of production is testimonial regardless of who receives the records. Cf. United States v. Rogers Transportation, Inc., 763 F.2d 165 (3rd Cir. 1985) (recognizing difficulty in requiring corporate custodian to supply records to newly appointed agent).

Several other Circuits have attempted to avoid the problem by stating that the custodian's act of production is not testimonial, and hence not covered by the fifth amendment, and then holding that any attempt by the government to "add" testimonial content to the act by attempting to use it against the custodian would be subject to suppression. See In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1987); In re Grand Jury Proceedings (Morganstern), 771 F.2d

143, 148 (6th Cir.) (en banc), cert. denied, ___ U.S. ___, 106 S.Ct. 594 (1985). This "solution" suffers from two flaws; it makes no sense, and it ignores this Court's explicit rejection of constructive use immunity in Doe. The approach makes no sense because an act of production either has testimonial content or does not. The government cannot invest a non-testimonial act with testimonial content simply by attempting to use it as evidence. More important than this analytical flaw is the fact that this Court in Doe expressly rejected the government's suggestion that it should create constructive use immunity. 465 U.S. at 609-10; see also In re Special Federal Grand Jury Empanelled October 31, 1985, 819 F.2d 56 (3rd Cir. 1987) (refusing simply to order government not to use act of production against the

custodian). Rather, the government must follow the statutory procedures set forth and obtain statutory immunity pursuant to 18 U.S.C. §§ 6002 and 6003.

The proper solution to the problem is simple; the government must grant someone within the organization who is capable of producing the records statutory use immunity if the act of production would otherwise personally incriminate that person. A grant of use immunity, which is limited to use of the custodian's act of production, does not undermine the collective entity rule as explained in Bellis v. United States, 417 U.S. 85 (1974), United States v. White, 322 U.S. 694 (1944), or Wilson v. United States, 221 U.S. 361 (1911). The collective entity rule, which simply denied fifth amendment protection to organized entities, rested both upon the view that

the fifth amendment should be limited "to its historic function of protecting only the natural individual from compulsory incrimination," Bellis at 89-90 (quoting White at 701), and upon the belief that the fifth amendment was intended to protect an individual's "right to a 'private enclave where he may lead a private life.'" Bellis at 91 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)). Neither of these interests are adversely affected by requiring that the government observe the personal fifth amendment rights of individuals who are involved in the running of organized entities. Indeed, a requirement that the government obtain statutory use immunity before requiring an individual to perform the act of producing an organization's records is in harmony with this Court's consistent distinction between the fifth

amendment rights of individuals and the lack of such a right in collective entities.

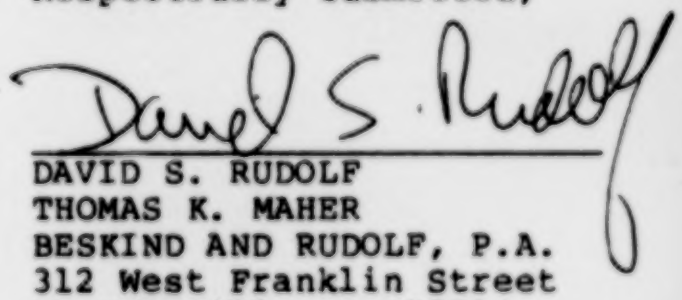
By granting use immunity, the fifth amendment rights of the custodian are fully protected from use of the act of production against him personally. The government is also fully protected as it obtains access to the documents, and remains free to prosecute the corporation and the custodian. It must merely refrain from using the act of production against the custodian personally. As the government was not entitled to the testimonial content of the act of production to begin with, and as the organization's records are made available to it, the government has not lost anything to which it was entitled and the organization has not somehow obtained the protection of the fifth amendment.

CONCLUSION

This Court should hold that the custodian of an organization's records retains his personal fifth amendment privilege with respect to performing an incriminating, testimonial act of producing these records that can only be overcome by a proper grant of statutory immunity.

This the 3rd day of December, 1987.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I served the annexed Brief Amici Curiae on the parties by placing copies in the United States mail, postage prepaid, on December 3, 1987, addressed as follows:

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